SUPREME COURT, U. S. 72-1559

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

THE HERTZ CORPORATION,
Petitioner,

v.

DONALD COX AND SARAH CROWE HARRIS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, The Hertz Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 26, 1973.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (A. 24) is reported at 472 F.2d 552. The order of the court denying Hertz's Petition for Rehearing (A. 27) is not yet reported. The opinion of the United States Court of Appeals for the Fifth Circuit on the prior appeal of this case (A. 1) is reported as *Hertz Corp.* v.

Cox at 430 F.2d 1365. The order of the court denying Hertz's Petition for Rehearing and Petition for Rehearing En Banc on the prior appeal (A. 23) is reported at 436 F.2d at 1376.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit is dated and was entered January 26, 1973. A timely petition for rehearing was denied on February 23, 1973, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the term "proper insurance" as used in Petitioner's advertisements in American magazines means, as a matter of law, and as held by the Eighth Circuit (per Judge, now Justice, Blackmun), only that insurance required by the laws and customs of the place where the vehicle was rented and driven and where the accident occurred (in this case, the Bahamas), or whether the meaning of the term, as held by the Fifth Circuit in the instant case, is governed by the laws and customs of the place where Respondents read Petitioner's advertisements (in this case, Georgia).

STATEMENT OF THE CASE

This is an action for damages for alleged fraud and misrepresentation as to insurance coverage brought against The Hertz Corporation in a diversity suit by the driver and the passenger of an automobile rented in the Bahama Islands from Caribbean Motor Holding Company (hereinafter "Caribbean"), a licensee-subsidiary of a subsidiary of Hertz, that collided with another vehicle causing per-

sonal injuries to the passenger.[1] A judgment for $205,000.00 was rendered against Hertz based on the theory that the driver and passenger had read and relied upon Hertz's advertisements in American magazines that its "national average" rental rates included "proper insurance" and that these advertisements were false because Caribbean did not provide a driver of the vehicle, rented in the Bahamas, unlimited liability insurance covering any liability that he might incur to passengers in the rented vehicle. Judgment was entered against Hertz despite uncontroverted evidence that *passenger coverage is neither customary nor legally required in the Bahama Islands, and, in fact, is not even obtainable there.*

The case has been before the United States Court of Appeals for the Fifth Circuit on appeal three times. On the first appearance the Court of Appeals reversed a summary judgment that had been granted Hertz and remanded the case for a trial on the merits for reasons not germane to any issue in the instant appeal.[2]

The case then proceeded to trial before a jury and a judgment was rendered against Hertz for $205,000.00. Hertz appealed from the judgment, asserting, *inter alia*, that the term "proper insurance" as used in Hertz advertisements meant, as a matter of law, only that insurance required by the laws and customs of the Bahamas, the

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[1] The person who actually rented the automobile from Caribbean, Aldo Bergomi, an Italian citizen, was not present in the automobile at the time of the collision and is not a party to this lawsuit.

[2] Hertz had been dismissed on the ground that it was not present in the Bahamas at the time of the passenger's injuries, either in person or through an actual agency. As the basis for its reversal, the Fifth Circuit held that the actual presence of Hertz in the Bahamas was not a prerequisite to bringing an action against it for injuries on the theory that Hertz's licensee in the Bahamas acted contrary to advertised statements concerning insurance. *Crowe* v. *Hertz Corp.*, 382 F.2d 681 (5th Cir. 1967).

place where the vehicle was rented and driven and where the accident occurred. The court of appeals reversed the judgment of trial court against Hertz on the sole ground that the district court had failed to instruct the jury that under Georgia law scienter is an essential element in actions for damages based upon fraud. 436 F.2d 1364 (5th Cir. 1970), (A. 1). Because of its ruling on the scienter issue, making a remand necessary, the court noted that it was not compelled to examine the other points of error raised by Hertz, but nevertheless did so in view of the likelihood of a new trial. With respect to Hertz's point of error concerning the meaning of "proper insurance," the court of appeals stated that even though the rental agreement was signed and the accident occurred in the Bahamas, Georgia customs and laws governed the meaning of the terms because at least some of the advertisements were circulated in Georgia. In so doing, the court expressly declined to follow the holding of the United States Court of Appeals for the Eighth Circuit in *Stearns* v. *Hertz Corp.*, 326 F.2d 405 (1964), *cert. denied*, 377 U.S. 934, 84 S.Ct. 1338, 12 L.Ed. 298 (A. 35), which held that the term "proper insurance," as used in Hertz's advertisements, means, as a matter of law, only that insurance required by the laws of the jurisdiction where the injury occurred and where the act of reliance took place. Hertz filed a Petition for Rehearing, and for Rehearing En Banc, which was denied. 436 F.2d 1376 (5th Cir. 1971) (A. 23).[3]

The case was again tried, and a judgment again rendered against Hertz for $205,000.00. In its appeal from this judgment, Hertz urged the Court of Appeals for the

[3] Hertz did not seek a writ of certiorari because the case was reversed and remanded for a new trial, and because the Fifth Circuit's ruling as to the meaning of "proper insurance" was at that time only dictum. During the second trial on the merits, however, the district court felt bound by the Fifth Circuit's rejection of *Stearns*.

Fifth Circuit to reconsider its previous rejection of the holding of *Stearns* v. *Hertz Corp., supra*, with respect to the meaning of "proper insurance." In a per curiam opinion, the Court of Appeals for the Fifth Circuit held that it was bound by the "law of the case" and affirmed the trial court's judgment. 472 F.2d 552 (1973).

With several significant exceptions, the evidence introduced at the second trial of this case was substantially similar to the evidence presented at the first trial.[4] Cox, the driver, and Mrs. Harris (nee Crowe), the injured passenger, testified that prior to coming to the Bahamas in June 1965, they had read Hertz's advertisements in the United States referring to "proper insurance" (C.A. No. 2, App. 246-7, 381-82), and that these advertising representations, appearing for the last time in 1959 magazines (C.A. No. 2, App. 88), together with their knowledge that Hertz was the largest rent-a-car company in the world, instilled in them a general sense of well-being in driving and riding in a Hertz automobile in the Bahamas and caused them to assume that while so doing, they would have liability insurance covering passenger claims against the driver (C.A. No. 2, App. 327-28, 387, 407, 408). At no time did they testify that they anticipated or assumed that they would be provided with unlimited passenger coverage. They simply assumed that Hertz would provide them the same kind of insurance coverage in the Bahamas that they had on their family automobiles in Georgia and Kentucky (C.A. No. 2, App. 247) or that Hertz might pro-

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[4] References in this Petition are to the appendices in the court of appeals. References to the Appendix in the appeal from the first trial will be designated "C.A. No. 1, App. ." References to the Appendix in the appeal from the second trial will be designated "C.A. No. 2, App. ."

vide them in renting an automobile in the United States (C.A. No. 2, App. 249, 385).[5]

At both trials Hertz's defense consisted of showing what Bahama laws require and what is customary and obtainable in the Bahamas in the way of liability insurance for self-drive or rent-a-car vehicles. While there was some testimony that passenger coverage in a limited amount was customary for family automobiles in Georgia,[6] *it was undisputed that*

[5] Although plaintiffs testified that their own family automobile policies included passenger coverage, limited in recovery to $100,000.00 per person and $300,000.00 per collision (C.A. No. 2, App. 241, 247, 394), the undisputed evidence showed that prior to 1962 no rent-a-car company would have provided passenger coverage to a renter in this country except in four states whose laws expressly required such coverage (neither Georgia nor Kentucky was one of the four states), and that even when provided, passenger coverage was always limited in amount. (C.A. No. 2, App. 575-79).

[6] Plaintiffs introduced testimony from two Georgia insurance agents and a Georgia attorney that an exclusion of passenger coverage in policies on family automobiles in Georgia would not constitute "proper insurance" (C.A. No. 2, App. 100, 123). These witnesses admitted, however, that they were not familiar with what constituted "proper insurance" outside of the United States (C.A. No. 2, App. 106, 135, 170), or with what constituted "proper insurance" on you-drive-it automobiles within the United States (C.A. No. 2, App. 104, 129), or with what constituted "proper insurance" as to rent-a-car companies in Georgia prior to 1962 (C.A. No. 2, App. 170).

In contrast with this testimony, an insurance expert called by Hertz testified that prior to 1962, no rent-a-car company in the United States provided passenger coverage except in four states whose laws expressly required such coverage (neither Georgia nor Kentucky was one of the four states), that rent-a-car policies excluding passenger coverage had been filed and approved by the commissioners of insurance in all other states prior to 1962, and that indeed a policy excluding passenger coverage had been filed on behalf of Hertz and approved by the Commissioner of Insurance of Georgia in 1953, 1956, and 1959 (C.A. No. 2, App. 576-77). Moreover, Hertz's expert witnesses testified that no rent-a-car company provided any kind of liability coverage at any time in excess of $100,000.00 per person (C.A. No. 2, App. 579).

Plaintiffs' witnesses further testified that a rent-a-car policy approved by the Georgia Commissioner of Insurance would be "proper insurance" (C.A. No. 2, App. 103, 182), and that they had never heard of unlimited liability coverage (C.A. No. 2, App. 109-10, 135, 177).

passenger coverage was neither legally required, customary, nor obtainable for rental vehicles in the Bahamas at the time of the accident.[7]

At the second trial, in view of the Fifth Circuit's ruling on the necessity of proving scienter, Hertz offered the testimony of its general counsel. He explained that it was his responsibility to review Hertz's domestic advertising policies to assure that they were not misleading (C.A. No. 2, App. 539) and that in 1959, when Hertz first received notice of the claim by the plaintiffs in *Stearns* v. *Hertz Corp.*, 326 F.2d 405 (8th Cir. 1964), he reviewed with Hertz's advertising department the use of the term "proper insurance" in its domestic advertising, and suggested that use of the term be discontinued in order to avoid any possibility of claims such as that being asserted by the plaintiff in the *Stearns* case (C.A. No. 2, App. 541-42). Over Hertz's objection, the trial court refused, however, to allow Hertz's general counsel to testify as to the holding of the Eighth Circuit in the *Stearns* case (C.A. No. 2, App. 543-46, 562-3) and to explain that it was his interpretation of that holding and reliance thereon that caused Hertz to believe that there was nothing inconsistent between its prior advertising of "proper insurance" in the United States and its policy of requiring all foreign licensees and subsidiaries to provide at a minimum that insurance required by laws of the coun-

[7] Section 10 of the Road Traffic Act of 1958 of the Bahamas (C.A. No. 1, App. Exhibit DH-2, reproduced in part at p. A-44 of the Appendix to this Petition) provides that the insurance policy required for a self-drive vehicle need not cover the driver's liability "to persons being carried in . . . the motor vehicle. . . ." Hertz called three expert witnesses from the Bahamas who testified that no rent-a-car company provided passenger coverage in the Bahamas and that, in fact, it was impossible to obtain passenger coverage on a self-drive vehicle in the Bahamas (C.A. No. 1, App. 527-34, 555-56, 567, 572-74, 581, 586-87; C.A. No. 2, App. 654, 656-57, 664-65). *The expert testimony on Bahama insurance laws and customs was entirely uncontradicted.*

try in which they were doing business (C.A. No. 2, App. 564-69). The exclusion of such testimony, directly bearing on the issue of scienter, was highly prejudicial since the trial court, over Hertz's objection, had allowed the plaintiffs to testify that in June 1965 when they were in the Bahamas, no one had warned them of the absence of passenger coverage, and in view of the persistent jury argument by plaintiffs' counsel that Hertz's failure to warn plaintiffs of the absence of such coverage in June 1965 and its failure to retract its advertising of "proper insurance", which was discontinued in 1959, was telling evidence of Hertz's culpability.

At both trials the case was submitted to the jury on special interrogatories. These interrogatories together with the jury's answers thereto are set out in the Appendix to this Petition (A. 45, 47). On the basis of the jury's answers, the trial court entered judgment at the first trial for $205,000.00 in favor of Crowe against Cox, for $205,000.00 in favor of Crowe against Hertz, and for $205,000.00 in favor of Cox against Hertz. The judgment provided that the payment of $205,000.00 by Hertz to Crowe would satisfy all judgments (C.A. No. 1, App. 937-38). At the second trial, the court entered judgment against Hertz in favor of Cox and Mrs. Harris in the amount of $205,000.00 plus interest at the rate of 7% per annum from January 31, 1968, the date of the prior judgment of Mrs. Harris against Cox (C.A. No. 2, App. 8-11).

At both trials Hertz moved for judgment notwithstanding the verdict on the ground that the meaning of "proper insurance" was, under the holding of the Eighth Circuit in *Stearns*, to be governed by the laws and customs of the Bahamas (C.A. No. 1, App. 921; C.A. No. 2, App. 767-782). At the second trial Hertz also moved for a new trial on the ground that the trial court erred in refusing to allow

Hertz's general counsel to explain the result of *Stearns* v. *Hertz Corp.* and its effect on the subsequent conduct of Hertz. Hertz's motions were denied at both trials (C.A. No. 2, App. 778).

REASONS FOR GRANTING THE WRIT

The Decisions Below Create an Irreconcilable Conflict with the Decision of the Court of Appeals for the Eighth Circuit in *Stearns* v. *Hertz Corp.*

The instant case and the *Stearns* case are indistinguishable with respect to the question presented by this Petition. Plaintiff Betty Jeanne Stearns was seriously injured when an automobile in which she was a passenger turned over. At the time of the accident the automobile was being driven by Howard L. Sutton, who had rented it earlier that day from The Hertz Corporation. The rental agreement was executed in Illinois and the accident occurred there.

Stearns sued Sutton in a Missouri state court, and Sutton called upon Hertz and Continental Casualty Company, the company that had issued the policy covering the vehicle rented by Sutton, to defend him. Both refused to do so on the ground that Continental's policy with Hertz excluded coverage for passengers in the car. Stearns recovered judgment against Sutton in the state court suit, and then both Stearns and Sutton brought suit against Hertz in the Eastern District of Missouri. They proceeded against Hertz on three theories: (1) that the passenger exclusion clause in the Continental policy provided by Hertz violated an Illinois statute; (2) *that Sutton had relied upon Hertz's advertisements of "proper insurance" as meaning passenger coverage* and (3) that the passenger exclusion clause was violative of the public policy of Illinois. *Stearns* v. *Hertz Corp.*, 211 F.Supp. 506 (E.D. Mo. 1962) (A. 28).

The non-jury trial which followed in *Stearns* produced the same kind of testimony that the trials below did.[8] Sutton testified that at the time he rented the Hertz automobile, he was traveling around the country giving dance performances with Stearns (Stearns R. 33-4). He testified that he had read Hertz advertisements which "*appeared throughout the country,*" which recited "Low Hertz rates include all gasoline, oil and *proper insurance* . . ." 211 F.Supp. at 508. While Sutton's testimony was vague in this regard, just as was Harris's and Cox's, he testified that he had seen these ads or similar ones prior to 1956 (Stearns R. 68) and had relied upon them in renting the Hertz vehicle. He stated that these ads had led him to believe that Hertz would provide him with insurance which would cover any liability he might incur to occupants of the rented vehicle. The trial court also found that Sutton, when renting the car, had been told by the Hertz agent "that $25,000/$50,000 liability coverage, $5,000 property damage and $100 deductible collision coverage was provided, as well as fire and theft; and Sutton did not inquire about the details of the insurance nor was it discussed and that he assumed he was completely covered." 211 F.Supp. at 507. On behalf of Sutton, an insurance agent testified that "proper insurance" would include coverage for injuries to occupants of the covered vehicle (Stearns R. 98-101).

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[8] The following facts and references are either reflected in the opinions of the *Stearns* case or taken from the record of that case filed with the Eighth Circuit Court of Appeals. If a writ of certiorari is granted, a copy of that record will be filed with this Court which, of course, may take judicial notice of the briefs and records filed in prior proceedings in other federal courts. *See e.g., Commonwealth of Pennsylvania* v. *Brown,* 373 F.2d 771 (3rd Cir. 1967); *Factor* v. *Pennington Press Inc.,* 230 F.Supp. 906, 908 (N.D. Ill. 1963).

Hertz's sole witness was an insurance agent who had been employed by Continental Casualty Company, the Hertz insurer. He testified that the Hertz-Continental policy had been approved by the Illinois Secretary of State (Stearns R. 138) and that it was a standard policy which had been in effect for many years prior to 1956. He stated that the rental car policy containing a passenger exclusion provision was being used by five or six other rent-a-car companies, including Avis and National, throughout the country (*id.* at 140) and had been approved by the state insurance departments of all but perhaps five or six states (*id.* at 141).

After reviewing the Illinois statutory scheme, the trial court concluded that Illinois law did not require passenger liability coverage and that a passenger exclusion provision would not violate Illinois public policy. As to the plaintiff's contention that Hertz was obligated to make good its advertising representations of "proper insurance," the trial court held:

> "Plaintiffs also contend that Hertz' advertising binds it to furnish 'proper insurance.' *However, under the circumstances, 'proper insurance' cannot be construed to include coverage other than required by Illinois law, and the insurance provided complied with the Illinois law. Ibid.* (Emphasis ours.)

The Eighth Circuit, agreeing with the conclusions of the District Judge, affirmed. Speaking for the Court, Judge, now Mr. Justice Blackmun, stated:

> "Although Sutton testified in very general terms about having seen several Hertz advertisements referring to insurance, he admitted on cross-examination that the only one he was positive about was one in the 1955 Hotel Red Book. This recited 'Hertz low rates include everything. * * * That includes gasoline, oil * * * and Public Liability, Property Damage, Fire

and Theft Insurance, and $100.00 deductible collision protection.' *Other ads spoke of 'proper insurance.' Here again we agree with the district court that the latter term is to be construed to mean the coverage required by the Illinois law. The insurance provided did comply with that law.* Also, Hertz's policy outstanding at the time of the accident satisfied the description in the Red Book advertisement, for, despite the exclusion, it provided public liability, property damage, fire and theft insurance and $100 deductible collision protection." 326 F.2d at 408-09. (Emphasis ours.)

The holding in the *Stearns* case, that "proper insurance" is the coverage required by the law of the place where the vehicle was rented and where the accident occurred, which was followed by the California courts in *Atlantic National Ins. Co.* v. *Armstrong*, 49 Cal. Rptr. 439 (Dist. Ct. App. 1966), *rev'd on other grounds*, 416 P.2d 801 (Cal.), remained the law of the land and had been relied upon by Hertz until the decision below on the second appeal of this case. In that decision, the Court of Appeals for the Fifth Circuit, without citing any authority and with little explanation, expressly rejected *Stearns* in favor of a test that "depends on what a reasonable renter would think." 430 F.2d at 1372.[9] In its per curiam opinion on the second

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[9] Before expressly rejecting *Stearns*, the court attempted to distinguish the case by noting that in *Stearns* the advertisements as well as the execution of the rental agreement and the accident occurred in Illinois, while in *Crowe* the advertisements occurred in Georgia and Kentucky. 430 F.2d at 1370. An examination of the opinions and the record of the case filed with the Eighth Circuit Court of Appeals, however, offers no basis for concluding that Sutton's reading of the Hertz advertisements occurred only in Illinois. To the contrary, the opinions and record indicate that the advertisements "appeared throughout the country." 211 F.Supp. at 508, and that at the time he rented the Hertz automobile, Sutton was traveling around the country giving dance performances with Stearns (Stearns R. 33-4).

Moreover, by placing emphasis on the place where the misrepresentation *may have occurred*, the Fifth Circuit completely

appeal, the Fifth Circuit refused to reconsider the question of the meaning of "proper insurance," stating that this question was governed by its previous decision in the case. 472 F.2d 552.

This Court should resolve the conflict between the Fifth and Eighth Circuits on this question. Although we believe that the holding of the Eighth Circuit in *Stearns* correctly resolves the question, the contrary decision of the Fifth Circuit has created confusion and uncertainty on this point which will continue to plague those doing business on a multi-state and multi-nation basis, particularly those like Hertz who had relied upon the *Stearns* decision.

The importance of resolving this question in favor of the ruling in *Stearns* is underscored by the almost impossible task the decisions of the Fifth Circuit impose on companies with world-wide operations and advertising that must provide insurance in many diverse places. Not only automobile leasing and renting companies such as Hertz, Avis, National, et cetera, but equipment rental companies, trucking companies, and a number of other businesses will suffer from the impossible burden and uncertainty engendered by the reasonable renter passenger definition applied to

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overlooked the well-established conflict-of-law principle that in a fraud or misrepresentation case, all elements of the cause of action are governed by the laws of the place where the *injury* or *reliance* takes place and not the laws of the place where the misrepresentation was made. *E.g.*, *Hanson* v. *Ford Motor Co.*, 278 F.2d 586 (8th Cir. 1960); *Vanity Fair Mills, Inc.* v. *T. Eaton Co.*, 234 F.2d 633, 639 (2d Cir. 1956); *Smyth Sales, Inc.* v. *Petroleum Heat & Power Co.*, 128 F.2d 697 (3rd Cir. 1942); *Pat J. Murphy, Inc.* v. *Drummond Dolomite, Inc.*, 214 F.Supp. 496 (E.D. Wis. 1963); *Smith* v. *New York Life Ins. Co.*, 208 F.Supp. 240 (S.D. Iowa 1962); *Strand* v. *Librascope, Inc.*, 197 F.Supp. 743 (E.D. Mich. 1961); *Western Newspaper Union* v. *Woodward*, 133 F.Supp. 17 (W.D. Mo. 1955); *Boulevard Airport* v. *Consolidated Vultee Air Corp.*, 85 F.Supp. 876 (E.D. Pa. 1949); *Geller* v. *Transamerica Corp.*, 53 F.Supp. 625 (D. Del. 1943); Note, *Conflict of Laws in Multistate Fraud and Deceit*, 3 VAND. L. REV. 767 (1950).

"proper insurance" by the Fifth Circuit. An idea of the tremendous differences throughout the world in laws and customs governing insurance may be gained through examination of the tabular summary of Auto Liability Insurance Requirements of Foreign Countries set out in the Appendix to this Petition (A. 49), which shows only a few of the variations of insurance requirements existing in different countries.

Under the holding in *Stearns* a multi-national business could resort to the law or customs of the various countries in which it was operating to determine whether it was providing "proper insurance" to its customers. But under the criterion announced by the Fifth Circuit, in which the definition of "proper insurance" was made dependent on "what a reasonable renter would think" (and which specifically applies to *passengers* of rent-a-cars as well), a business has no way of determining whether it provides proper insurance. To cope with the Fifth Circuit's test, a business would have to resort to one of three alternatives, all highly undesirable from the standpoint of both the business and its potential customers.

First, a business could provide the best insurance possibly conceivable *anywhere*. Such insurance would have to provide unlimited coverage, both as to bodily injury and property damage, since such coverage is available in Belgium and some parts of Australia (A. 49); would have to provide unlimited liability to guests, since such coverage is available in Belgium and in Adelaide, Australia (A. 49); and would have to provide unlimited coverage for every other type of catastrophe known to have befallen an automobile, its driver, passengers, or third parties involved in an accident with the automobile, since every known type of coverage is available somewhere in the world. Moreover, since no exclusion is applicable everywhere, no exclusions or exemptions to coverage could be allowed, *e.g.*, exclusions

relating to use: "commercial use," "automobile business," "public or livery conveyance," "farm use"; exclusions relating to the kind of vehicle covered: hired automobile, non-owned automobiles furnished for the insured's regular use; exclusions relating to the occupation of the driver; exclusions relating to persons whose injuries are covered: guests, paying passengers, relatives of the insured, members of the insured's household or family, employees of the insured. Although no single state or nation has such unlimited coverage against every risk provided, with no exceptions or exclusions, a business which could not limit the domicile of its potential customers and their permissive users would have to provide such coverage to be fully safe under the judgments of the Fifth Circuit below.[10] Obviously, common sense and reasonable business practice dictate that some limit to the meaning of "proper insurance" exist. Hertz submits that the insurance required by the laws and customs of the jurisdiction in which the car is rented constitutes a reasonable and workable limit to the definition of "proper insurance."

The second alternative would be to tailor-make the coverage provided to each customer according to the insurance deemed proper where he resides. This would require that each of the employees of a rental company such as Hertz be expert in the insurance laws and customs of every state or province of every country in the world, and have sufficient actuarial expertise to compute the rate to be charged for such coverage. Moreover, the policy tailored to an individual renter would have to take into consideration the coverage required by law and custom in the home of each prospective *passenger* of the renter, in view of the Fifth Circuit's holding that a business owes not only the cover-

[10] It should be remembered that Hertz did not advertise that its rates included the "best," "fullest," "broadest" insurance coverage imaginable or obtainable anywhere. It simply said its insurance would be "proper."

age that its customers "think" is proper, but also that which the customers' passengers "think" is proper.[11]

The astronomical cost associated with the first two alternatives would make the price of renting a car with "proper insurance" prohibitive to all but middle-Eastern oil potentates or Swiss gold speculators (who would have doubtful use for rent-a-cars in the first place) and would effectively destroy the rent-a-car industry and other industries providing insurance to customers in various states or foreign countries. In lieu of allowing their businesses to be destroyed, it is obvious that companies such as Hertz would discontinue providing insurance with rented vehicles in all jurisdictions where such coverage is not required by law[12] —thus foreclosing a valid, desirable means of competition, and leaving renters with the unsatisfactory choice of providing such coverage under their own personal automobile policies, or assuming the risk of renting a car on which no insurance coverage existed.[13]

Besides imposing an impossible hardship on businesses with world-wide operations,[14] the test articulated by the

[11] This is true even though a passenger, as a total stranger to the rental transaction, will often, as in the instant case, have never been inside the rental company's offices.

[12] In jurisdictions in which an auto rental company is required by law to provide insurance on rent-a-cars, the exhorbitant rates necessary to comply with the Fifth Circuit's test will, under the rationale discussed under the first two alternatives, require the company to cease doing business.

[13] To the extent that renters knowingly opted for the latter alternative or erred in concluding that their personal policy provided such coverage, innocent third parties involved in collisions with such renters would also suffer under this alternative.

[14] The hardships imposed by the Fifth Circuit's what-the-reasonable-renter thinks test are present regardless of whether the company involved refers to insurance in its advertisements. When a vehicle is rented from a company providing some insurance, it is impossible to avoid the use of some shorthand and abbreviated references, either orally by the rental agent or in writing in the rental agreement, to the coverage being provided. And under the Fifth Circuit's test, whatever is said must be judged solely by what the renter expects.

Fifth Circuit below will also create unwarranted discrimination among automobile renters from different parts of the world. For example, many countries, *e.g.*, Belgium, require unlimited coverage for all third parties including passengers. Other countries require varying limits of coverage for third parties including passengers, *e.g.*, Austria ($23,000.00), France ($101,000.00). In others unlimited or limited coverage for third parties, but none for passengers, is required or customary, *e.g.*, Great Britain, Norway, Greece, Portugal, Italy. In fact, the laws of several Canadian provinces expressly provide that auto liability policies need not cover claims by passengers. (A. 49). Suppose a Frenchman, Austrian, Englishman and Belgian all read in their respective countries a Hertz or Avis or National rent-a-car ad promising "proper insurance," and then each traveled to a country where passenger coverage was not required or customary and rented a car from the same agency at the same time. Regardless of the fact that each was provided with that coverage which was customary or required at the place where the rentals occurred, unless the judgments below are reversed, with respect to claims by injured passengers, the Frenchman would be entitled to judgment against the advertiser for $101,000.00, the Austrian to $23,000.00, the Englishman to nothing, and the Belgian to an unlimited amount, all without regard to whether such coverage is even obtainable. The inequality of treatment would be even greater if passengers from different countries were riding in the same rent-a-car. Had Bergomi, the Italian who actually rented the car from Caribbean, been riding in the car with Cox and Harris at the time of the collision, he would be entitled to no recovery under the decisions below since passenger coverage is neither required nor customary in Italy where he resided, while Harris is entitled to an enormous judgment merely because she was a resident of Georgia.

Not only is this discrimination grossly inequitable and supported by no reasonable justification, but such discrimination invites artifices to circumvent its effect. Thus it is quite conceivable that an injured renter or passenger would claim as his residence the jurisdiction offering him the greatest amount of "proper insurance protection." Even an honest renter or passenger would be afforded some *ex post facto* choice concerning the coverage he desires to avail himself of after an accident. If he does not like the limits or the coverage afforded him at the place where the car is rented, he is given the benefits of the limits and coverage of his domicile. Should his domicile provide no coverage or low limits, however, he can then assert his belief that he expected "proper insurance" to mean the coverage where he rented the car.[15]

Obviously the fairer and more reasonable rule is that adopted by the Eighth Circuit in *Stearns*. By using the law or custom of each jurisdiction in which it operates as a test, a business can fairly and accurately assure itself and its customers of providing "proper insurance." In addition, all customers and passengers would be afforded the same insurance protection without regard to their alleged residences.

Unless this Court grants a writ of certiorari, only companies operating solely in the Eighth Circuit and only amenable to suit there, will be able to rely upon the holding in *Stearns*. Those doing business or amenable to suit else-

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[15] The result in this case is even more ludicrous. Here Cox and Harris were given *coverage* which they allegedly thought to be standard in this country and *limits* which were standard in the Bahamas and unheard of here. Thus, not only were they given the best of two worlds, they were permitted to confuse them and take the best of one world on one issue and the best of the other world on the other.

where will be forced to comply with the unworkable, discriminatory rule applied by the Fifth Circuit in this case.[16] For some, like Hertz, compliance may be impossible. Having relied in good faith on the *Stearns* rule in tailoring their insurance coverage to their advertising representations, they now may learn that old advertisements never die and that they may be subjected to exhorbitant judgments for fraud based upon advertising published and insurance provided at a time when the *Stearns* case represented the only judicial pronouncement in point.

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[16] Attendant with such compliance will be the prohibitive expense associated with the "reasonable renter/passenger" rule. The actual effect of the confusion engendered by the conflicting rules may be an end to automobile insurance on rent-a-cars everywhere except in the Eighth Circuit.

CONCLUSION

For this reason, a writ of certiorari should issue to review the judgments and opinions of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies that three copies of the foregoing printed Petition for Writ of Certiorari have this the 16th day of May, 1973, been served upon each counsel of record for respondents in accordance with Rule 33 of this Court, by depositing the same in the United States Mail with first-class postage prepaid, addressed to said counsel at their post office addresses.

Leon Jaworski

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 26251

SEPTEMBER 2, 1970

THE HERTZ CORPORATION,

Plaintiff-Appellant,

v.

DONALD COX AND SARAH C. CROWE,

Defendants-Appellees.

Before WISDOM and DYER, Circuit Judges, and KRENTZMAN, District Judge.

KRENTZMAN, District Judge:

We reverse and remand for reasons set out more fully below.

In a previous consideration of this case this court considered the question of whether or not the Hertz Corporation, which engages in the business of renting automobiles, could be dismissed from the action, by way of summary judgment on the grounds that Hertz was not present either in person or through an actual agency. At that time this court stated:

> "In dismissing the complaint against the Hertz Corporation it is obvious that the trial court did so on

the theory that the transaction between Cox and his friends in the Bahamas was not with the Hertz Corporation either directly or through an agent of that company. This, it seems to us, overlooks the essential nature of the suit that is brought by Miss Crowe and particularly as contended for by Cox, who admittedly is a protected driver of a 'Hertz Rent-A-Car' so far as being entitled to insurance protection is concerned. The complaint is based on the assumption that every person reading and relying upon the Hertz advertising is warranted in accepting as true the statement that wherever a 'Hertz' car is rented worldwide, the person relying upon such advertising is guaranteed that the highest standard of insurance protection is offered; that in this case the defendant Hertz Corporation, whether or not acting through its agent in the usual sense nevertheless provided through its subsidiary corporation for the renting to Cox of a 'Hertz' car which did not have the insurance protection guaranteed to the public * * *

"We think it plain that the presence or absence of the Hertz Corporation in the Bahama Islands at the time this automobile was rented by Cox and his friends is irrelevant to the cause of action asserted by the injured plaintiff. Certainly it is irrelevant to the cross action filed on behalf of Cox to secure his insurance protection in the event Miss Crowe should recover against him." Crowe v. Hertz Corporation, 382 F.2d 681, 687 (5 Cir. 1967).

The facts underlying this suit are as follows: On June 6, 1965, Donald Cox, then a nineteen-year-old student from Kentucky, flew to Nassau with several friends for a vacation. Cox and company stayed at the British Colonial Hotel. There Cox met Sarah Crowe, then twenty-six, a school teacher from Georgia. The next day Cox and one of his friends, Bill Grubbs, met Aldo Bergomi, a resident of Italy. The three of them decided to rent a car from the Hertz desk at the hotel. Cox testified that they all went to

the Hertz desk to inquire about renting a car. The agent at the desk, Bertram Rahming, testified that Bergomi alone came to the desk. Cox and Grubbs realized that they were too young to rent a car in their own names. They decided that Bergomi alone would sign the rental agreement, which he did. The agreement carried a paragraph relating to insurance coverage, but the policy itself was not available at the rental desk for inspection. Liability to passengers was expressly excluded from coverage in the policy, but this exclusion was not set out in the rental agreement.

Bergomi, Cox and Grubbs took turns driving Sarah Crowe and her sisters around Nassau on the afternoon of June 7. The next morning, June 8, Bergomi returned the car to Hertz. Later in the day the three boys agreed to rent another car from Hertz. It is undisputed that Bergomi this time went alone to the Hertz desk to rent a car. Later in the day Bergomi informed Cox that he had made plans for the evening and that Cox could use the rental car for a date that Cox had made with Sarah Crowe. The evidence is conflicting as to the manner in which Cox obtained possession of the car keys for his date. Cox testified that Bergomi left the keys at the Hertz desk for him to pick up. Sarah Crowe's testimony was to the same effect. Hertz employees on duty during this time testified that they had never delivered any keys to Cox. In any event, Cox got the keys, and he and Sarah Crowe began driving around Nassau in search of entertainment. Shortly after making a right turn, Cox steered the car into the wrong side of the road (in the Bahamas the "right" side of the road is the "wrong" side). A head-on-collision with another car occurred, and Sarah Crowe was seriously injured.

Evidence was introduced relating to certain advertisements purchased by Hertz which appeared in *Time Magazine*. These advertisements asserted that Hertz Rent-A-Car

rates included "proper insurance", "wherever in the world" a person may be going. Both Sarah Crowe and Cox testified that they had read these advertisements, believed them, and assumed that proper insurance would include insurance on passengers riding in Hertz automobiles. Apparently the last advertisement in which Hertz represented that their rates included proper insurance appeared in 1959, sometime before the events occurred which gave rise to this litigation.

Sarah Crowe filed this suit in the Northern District of Georgia against Cox, a resident of Kentucky, and the Hertz Corporation. Crowe alleged that Cox negligently drove the car on the wrong side of the road and that Hertz had fraudulently represented that insurance was provided to cover passengers in her position. Fraud was alleged on the ground that Hertz had represented that the driver was covered by $100,000 liability insurance and that no exclusion for passengers appeared in the rental agreement. Cox answered, denying his negligence, and cross-complaining against Hertz on the same theory of fraud asserted by Crowe. Cox and Crowe subsequently supplemented their complaints against Hertz, alleging that Hertz fraudulently advertised in the United States that its rental fee included "proper insurance", that they had relied upon these advertisements, and that Hertz had failed to warn them that it did not provide a standard liability insurance policy covering passengers in the Bahamas. Crowe asserted that, as a third party beneficiary of the Bergomi-Hertz rental contract, she could sue Hertz for breach of any warranty expressed or implied in the contract.

Hertz moved for summary judgment solely on the basis that it was not doing business in the Bahamas since the Hertz rental company in the Bahamas was not its agent. The district court granted Hertz's motion. This court

reversed without determining whether relief could be granted against Hertz as a proper party:

> "Because of the determination by the trial court that the Hertz Corporation was not present in the Bahamas through its agent, the court did not consider whether the complaint alleged a state of facts upon which relief could be granted either to Miss Crowe or to the cross-complainant Cox. We, therefore, do not pass on these questions." Crowe v. Hertz Corporation, *supra*, 382 F.2d at 688.

After remand, the parties agreed during the pretrial that the only ground on which Hertz could be held as a proper party was its advertising representations. Hertz moved for a severance of the negligence and fraud phases of the case, which motion was denied. At the close of plaintiffs' evidence, Hertz moved for a directed verdict. This motion, too, was denied. In so doing the district judge said:

> "This suit is not in contract, the way I see it, and I quite agree that the evidence does not show any reliance, even by Mr. Cox, on any alleged provision of the contract, and it is not a suit for a breach of any warranty.
>
> On the other hand, there has been some inference of fraud all the way through. The only kind of fraud that is possibly involved is what is called constructive fraud.
>
> It is not incumbent upon a plaintiff to show this was reckless, willful, fraudulent, in the sense of actual fraud, but it is just purely a question of whether there was representation made and whether it was relied on, whether they had a right to rely on it, and whether it was to their detriment."

Crowe, Cox and Hertz requested special interrogatories on scienter. The court denied each request on the ground that willfulness, recklessness, and knowledge on the part

of Hertz were not a part of the case. On the basis of the jury's answers to special interrogatories, the court entered judgment for $205,000.00 in favor of Crowe against Cox, for $205,000.00 in favor of Cox against Hertz and for $205,000.00 in favor of Crowe against Hertz. The judgment provided that the payment of $205,000.00 by Hertz to Crowe would satisfy all judgments.

Appellant, Hertz Corporation, raises six points on this appeal: (1) The terms "insurance" and "proper insurance" as used in Hertz advertisements mean, as a matter of law, only the insurance required by the laws and customs of the Bahamas, the place where the vehicle was rented and driven and where the accident occurred; (2) assuming that Bahama law does not determine the meaning of "insurance" or "proper insurance", and that such words constitute representations, the representations were true even when tested by the laws of the United States; (3) Hertz representations as to insurance did not constitute actionable fraud which must be predicated on a misrepresentation of an existing material fact upon which the plaintiff actually relies and has a right to rely; (4) assuming that Cox and Crowe actually relied upon Hertz advertisements as meaning that unlimited passenger coverage would be provided in the Bahamas, and that such meaning could be lawfully attributed to these advertisements, the district court erred in allowing the jury to determine that Cox and Crowe had a right to rely on insurance coverage that was expressly negated by the terms of the rental contract between Bergomi and Caribbean, Hertz's licensee; (5) the trial court erred in denying a severance or separate trials of the gross negligence cause of action against Cox and the fraud cause of action against Hertz; (6) the district court erroneously submitted the case to the jury on the theory of "constructive fraud" and refused to charge on scienter.

Since we conclude that the district court committed error on the basis of the sixth point raised by Hertz above, we are not compelled to examine the others.

However, since we have remanded the case for further proceedings, a new trial is likely, and this case has already now been before us twice, it is prudent that we rule upon the other points of error raised by Hertz as well as the point upon which ultimate disposition here depends.

1. Hertz advances two arguments for the proposition that its advertising representations mean, as a matter of law, only the laws and customs of the Bahamas. First it is submitted that the case of Stearns v. Hertz Corporation, 326 F.2d 405 (8 Cir. 1964) should control the instant case. In that case, Stearns, a Missouri resident, was injured in Illinois when the car in which she was riding overturned. The driver rented the car from Hertz in Illinois. Stearns sued the driver of the car in state court and recovered. Stearns and the driver then sued Hertz in federal court in Missouri for falsely representing that its rental fee covered all insurance, including liability to passengers. The same advertisements relating to "proper insurance" which are at issue here were involved in *Stearns*. Judge, now Justice Blackmun, speaking for the court, said:

> "* * * Here again we agree with the district court that the latter term ('proper insurance') is to be construed to mean the coverage required by the Illinois law. The insurance provided did comply with that law." *Id.* at 409.

Illinois did not require passenger liability insurance. The court thus affirmed judgment for Hertz.[1]

Hertz contends that *Stearns* is on all fours with this case and is not distinguishable. We disagree. In Stearns the

[1] The district court's memorandum opinion is reported at 211 F.Supp. 506 (E.D.Mo.1962).

misrepresentation occurred in Illinois, the rental agreement was signed in Illinois and the accident occurred in Illinois. It was conceded that the law of Illinois would control. *Id.* at 406. In this case, while the rental agreement was signed in the Bahamas and the accident occurred in the Bahamas, the misrepresentations and the wrongs occurred in Georgia and Kentucky respectively.

2. Assuming, however, that there is no point of distinction between this case and *Stearns*, we would not follow *Stearns*. Hertz advertised in the United States that its rental fee covered "proper liability coverage." Several Georgia cases are cited, however, upholding a variety of exclusion clauses. Even if we assume that the courts of Georgia would uphold a policy excluding passenger liability coverage, the inquiry is not put to rest, for customs are as much a factor under the test we have adopted above in rejecting Stearns v. Hertz Corporation, *supra*, as are laws. There was testimony at the trial below by insurance underwriters from the State of Georgia that they had never heard of such exclusionary clauses. The jury had evidence of the customs of the State of Georgia, and testing these customs against the representations made by Hertz, was warranted in concluding that the representations were untrue.

3. Hertz offers three arguments in support of its contention that its representations did not constitute actionable fraud. First, Hertz argues that its representations as to insurance were either (a) opinions in the nature of commendatory sales talk, (b) statements of law, or (c) promises as to what Hertz would provide its customers. Georgia cases are cited which hold that each type of representation is not actionable.

As to each of these contentions we feel somewhat con-

strained to rely on the interpretation of Georgia Law adopted by the district judge, a man who himself served for some years as a judge of the Superior Court of the State of Georgia. American Home Assurance Company v. Spicer, 402 F.2d 988 (5 Cir. 1968).

> "Being a diversity case as to which this court should pay substantial deference to the views of the trial court of the state involved, where jurisprudence at the highest level of the state court is lacking, we consider that we can do nothing better with respect to our judgment that the case should be affirmed than to accept and adopt the opinion of the trial court, which we do." *Ibid.*

Appellant cites two cases in urging that its representations were merely opinions. Both are clearly distinguishable. In DeMayo v. Walton, 114 Ga.App. 483, 151 S.E.2d 886 (1966), the court held that a representation was a mere statement of opinion upon which an action for fraud could not be predicated. However, in that case, no fraud was alleged because knowledge of the falsity of the representation was not alleged. *See infra.* Plaintiff was seeking to recover merely upon error in an employee's opinion, not upon fraud, which is alleged in the case at bar. The decision in Kontos v. Jordan, 57 Ga.App. 267, 195 S.E. 210 (1938) supports Hertz's contentions, but it was reached on pleading intricacies not relevant in Georgia since the adoption of liberalized rules of civil procedure.[2] We think the evidence offered at trial in this case was sufficient for the jury to find that the advertising representations were misleading statements of fact and not mere puffing.

As to whether or not Hertz's representations were statements of law, rather than fact, there is a line of cases which seem to hold that representations as to insurance coverage when made by an agent of an insurance company,

[2] Civil Procedure Act of 1966.

which holds no fiduciary relationship with an insured, are statements of law, *i. e.* involving the legal effect of an insurance policy, and are not actionable as fraudulent misrepresentations. Brown v. Mack Trucks, Inc., 111 Ga.App. 164, 141 S.E.2d 208 (1965); Fields v. Fire & Casualty Insurance Co., 101 Ga.App. 561, 114 S.E.2d 540 (1960); Sherwin-Williams Company v. St. Paul-Mercury Indemnity Co., 97 Ga. App. 298, 102 S.E.2d 919 (1958). Each of these cases partially turned on lack of showing of a fiduciary relationship and on lack of showing that the agent was acting within the scope of his employment. Agency is not involved in this case since Hertz made the allegedly fraudulent representations directly through advertising. Further, Hertz held out to the public as a whole that its rates included "insurance" or "proper insurance" and by so doing imposed a duty upon themselves. Hines v. Wilson, 164 Ga. 888, 139 S.E. 802, 803 (1927).

Hertz contends that its representations must be construed as representations as to future acts and therefore were merely promissory in nature. In Georgia, a fraudulent misrepresentation must relate to existing or past facts, and not to future acts. Jackson v. Brown, 209 Ga. 78, 70 S.E.2d 756 (1952); Warner v. Jeter, 115 Ga.App. 6, 153 S.E.2d 626 (1967); J. & C. Ornamental Iron Co. v. Watkins, 114 Ga. App. 688, 152 S.E.2d 613 (1966); Kennesaw Life & Accident Insurance Co. v. Flanigan, 114 Ga.App. 510, 151 S.E.2d 881 (1966); Strickland v. Levy's of Savannah, Inc., 112 Ga.App. 665, 145 S.E.2d 831 (1965); Ambrose v. Brooks, 109 Ga. App. 881, 137 S.E.2d 573 (1964); Monroe v. Goldberg, 80 Ga.App. 770, 57 S.E.2d 448 (1950); Cosby v. Asher, 74 Ga. App. 884, 41 S.E.2d 793 (1947); Crozier v. Provident Life & Accident Insurance Co., 53 Ga.App. 572, 186 S.E. 719 (1936). Hertz's representations, however, did not relate to future acts, but to existing facts. Hertz did not assert that it would someday in the future provide proper insurance

in its rental fees, but instead stated that its rental fees included proper insurance. This is what the jury found that Cox and Crowe relied upon. Even though the last mention of "proper insurance" introduced into evidence was made in 1959, while the accident occurred some six years later, reliance at the later date is not so remote a concept that the issue should have been removed from the jury's consideration. Hertz never published any limitations on its insurance policies or any retractions of its advertising representations.

Secondly, Hertz contends that there was insufficient evidence for the jury to conclude that Cox and Crowe relied on Hertz advertisements as being a representation that guest coverage would be provided, and no evidence that they relied on unlimited guest coverage. Certainly this is a close fact situation. Were it not so, we doubt that two appeals, and further action thereafter would be necessary. In rejecting Stearns v. Hertz Corporation, *supra,* we adopted a test whereby reliance in this sort of action depends on what a reasonable renter would think. Under such a substantive test, it is the jury's province to make the determination. We find that there was sufficient evidence submitted at trial for the jury to conclude that Cox and Crowe were justified in relying on Hertz's representations, and that they did in fact rely on them.[3]

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[3] Special interrogatories propounded to the jury on questions of reliance, and the jury's responses thereto were as follows:

"Section 2. 'On the Question of Insurance Coverage.'

5. 'Did the Hertz Corporation make any representation to the public through advertising or otherwise concerning "insurance" coverage or "proper insurance" coverage?'

Answer: 'Yes.'

6. 'If so, were such representations of such nature and character as to reasonably justify reliance thereon, on the occasion in question on June 8, 1965, by (a) Miss Crowe?'

Answer: 'Yes.'

'(b) Mr. Cox?'

Answer: 'Yes.'

Thirdly, Hertz argues that Cox and Crowe had no right to rely on the meanings which they and the jury attributed to Hertz's advertisements. In treating this contention it should suffice to say that we think someone could reasonably rely on the Hertz advertisements in deciding whether to rent, drive or ride in one of its rented cars. We cannot conclude that as a matter of law such reliance is unreasonable.

4. Appellant contends that even if Cox and Crowe were justified in relying, as the jury concluded they were, upon Hertz's advertising representations, the reliance is nonetheless negated by the terms of the rental agreement between Aldo Bergomi and Caribbean Motor Holding Company, Hertz's licensee in the Bahamas. Keeping in mind that the jury expressly found that Cox was operating the rental vehicle with the consent and permission of

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7. 'As reasonable persons, did Miss Crowe, as a guest passenger of Mr. Cox, as the driver of the car, actually rely on any such representations as to insurance on the occasion in question on June 8, 1965?'

(a) Miss Crowe?'
Answer: 'Yes.'

(b) Mr. Cox?'
Answer: 'Yes.'

8. 'If such were made, did any representation of "insurance" or "proper insurance" mean: (a) that liability insurance coverage would be afforded to guest passengers in Hertz vehicles rented to others in Nassau on June 8, 1965?'
Answer: 'Yes.'

'Or (b) that liability insurance coverage would be afforded as is required by the laws and customs of Nassau on June 8, 1965?'
Answer: 'No.'

9. 'If the answer to Question 8(a) is yes, what limits of liability insurance protection for a passenger should have been afforded under the representations of The Hertz Corporation?'
Answer: 'Unlimited.'"

Caribbean, and the uncontested evidence that the insurance policy was not immediately available for inspection, we find that the rental agreement did not as a matter of law negate reliance on Hertz's representations. Again, a substantive test is involved, and determination of reliance is for the jury.

5. Inherent in appellants' contention that the trial court erred in denying severance or separate trials of the gross negligence cause of action against Cox and the fraud cause of action against Hertz is the allegation that the trial court abused its discretion under Rules 13(g), 14(a), 20(b) and 42(b), F.R.Civ. Proc. We do not think this is the case. Crowe's claims against Cox arose out of the collision and her claim against Hertz arose out of advertising representations, but there are questions of fact and of law common to both causes of action, *e. g.* Crowe's damages. We do not think that Hertz is merely in the position of an indemnitor of Cox, since Crowe asserted a direct tort action against Hertz. The trial judge denied severance on several grounds: (1) The Court directed by pretrial order, filed before the motion for severance, that all issues involved in the case be determined in one jury trial, and no exceptions or motion to modify were filed in response to said order; (2) the case would be submitted to the jury on special interrogatories, which mitigate Hertz's position as indemnitor, insofar as Hertz stands in such a position; (3) Crowe asserted direct tort liability against Hertz; (4) the litigation would be expensive and lengthy. On these facts we find that the trial judge did not abuse his discretion in denying the motion for severance.

6. Hertz maintains that Georgia law requires that a misrepresentation, to be actionable, be made with "scien-

ter",[4] and that there is no evidence in the record of scienter on the part of Hertz. Hertz contends therefore that the district court erred in not instructing the jury on scienter even though all parties requested such a charge. The basis of this suit, as we said before, is that Hertz fraudulently misrepresented in its advertising that it provided insurance protection of the highest standard wherever Hertz cars are rented worldwide. Jurisdiction in this case is based upon diversity of citizenship and we are bound to decide this case as would a Georgia court based upon the law of Georgia. Erie Railroad v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); Stevens Industries, Inc. v. Maryland Casualty Company, 391 F.2d 411 (5 Cir. 1968); cert. den. 392 U.S. 926, 88 S.Ct. 2285, 20 L.Ed.2d 1386 (1968); Birkett L. Williams Company v. Smith, 353 F.2d 60 (5 Cir. 1965).

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[4] "Scienter" is a word of art. In Webster's Third New International Dictionary scienter is defined as "a degree of knowledge that makes an individual legally responsible for the consequences of his act — compare *misiake*." Unabridged Edition 2032 (G. & C. Merriam Co. 1966). The word is similarly treated in Black's Law Dictionary. "The term is used in pleading to signify an allegation * * * setting out the defendant's previous knowledge of the cause which led to the injury complained of, or rather his previous knowledge of a state of facts which it was his duty to guard against * * *" p. 1512 (4th Ed. 1957). "Scienter, a term usually employed in legal issues involving fraud, means knowledge on the part of a person making the representations, at the time when they are made, that they are false." 37 Am.Jur.2d Fraud & Deceit, § 197 (1968). "Scienter, as the term is here used, means such knowledge as charges a person with the consequences of his acts. To establish scienter or remediable fraud it is necessary and sufficient, the other essential elements being present, that the representations relied on were made either with knowledge of their falsity or with culpable ignorance of their truth * * *" 37 C.J.S. Fraud § 19 (1943). "* * * knowledge of the falseness of the impression produced by the statements or omissions made * * *" Myzel v. Fields, 386 F.2d 718, 734 (8 Cir. 1967), cert. den. 390 U.S. 951, 88 S.Ct. 1043, 19 L.Ed.2d 1143 (1968).

At common law, scienter is an essential element in an action for damages based upon fraud.[5] While there is a trend against strict requirements of scienter, a majority of American jurisdictions apparently adhere to the common-law view.[6] Georgia is in accord with the majority position. The landmark Georgia case cited by appellant is Penn Mutual Life Insurance Co. v. Taggart, 38 Ga.App. 509, 144 S.E. 400 (1928). In *Taggart* the trial court entered a judgment for plaintiff for damages alleged to have resulted from the defendant's fraud. The language used by the trial judge is reminiscent of the constructive fraud language used by the court below:

> "'The petitioner avers that the defendant made a misrepresentation of a material fact, upon which the petitioner acted to his injury. Such misrepresentation, even if made by mistake and innocently, constitutes legal fraud, and gives to the petitioner a right of action. Good faith of the defendant will not avail it. Intention of defendant is immaterial, if injury does actually occur.'" *Id.* at 401 (citations omitted).

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[5] In the textbook case of Derry v. Peek, 14 App.Cas. 337 (House of Lords 1889), Lord Herschell enunciated the common-law rule.

> "I think the authorities establish the following propositions: First, in order to establish an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief." *Id* at 374.

[6] See 37 C.J.S. Fraud §§ 19, 20, 25, and 1970 Supplement, (1943); 37 Am.Jur.2d Fraud & Deceit, §§ 197-202, 206 (1968).

The court of appeals reversed, establishing the necessity of a showing of willfulness or knowledge in a fraud action for damages.

> "Fraud is either actual or constructive. Either constitutes legal fraud. Actual fraud * * * involves moral guilt, since there must be an intentional purpose to deceive. * * *
>
> "* * * Either actual or constructive fraud may consist in the misrepresentation of a material fact. Whether the fraud is actual depends on whether the false representation was made with the purpose and intent to deceive.
>
> "A material misrepresentation, constituting actual fraud, may give rise to an independent action in tort for deceit, to recover for damage thus occasioned. In such a suit * * * *it must be shown that such representation was willfully and knowingly false, or what the law regards as the equivalent of knowledge, a reckless or fraudulent representation about that which the party pretends to know, but about which he knows that he does not know, and by which false pretense his purpose and intent is to deceive. Thus, in any suit sounding in tort for damages on account of actual fraud, the gist of the action is the purpose and design to deceive.*
>
> "* * * It follows that, whatever may be the rule in certain foreign jurisdictions with reference to innocent misrepresentations * * * under the statutes and decisions of this state such misrepresentations cannot amount to anything more than constructive fraud, and, as such, are not creative of any independent right of action for damages in tort in favor of the injured party; but they may support an action in equity to rescind a contract so induced * * *" *Id.* at 402 (Citations omitted, emphasis ours).

Accord, Dundee Land Co. v. Simmons, 204 Ga. 248, 49 S.E.2d 488 (1948); Gaultney v. Windham, 99 Ga.App. 800,

109 S.E.2d 914 (1959); Scott v. Fulton National Bank, 92 Ga.App. 741, 89 S.E.2d 892 (1955); Culverhouse v. Wofford, 86 Ga.App. 58, 70 S.E.2d 805 (1952); C. M. Miller Co. v. Ramey, 82 Ga.App. 807, 62 S.E.2d 768 (1950); Camp Realty Co. v. Jennings, 77 Ga.App. 149, 47 S.E.2d 917 (1948); Eastern Motor Co. v. Lavender, 69 Ga.App. 48, 24 S.E.2d 840 (1943); Brown v. Ragsdale Motor Co., 65 Ga.App. 727, 16 S.E.2d 176 (1941).[7]

Since the decision in Taggart, Georgia courts have uniformly and strictly insisted upon a showing of willfulness and knowledge in fraud actions for damages. A few examples are demonstrative. In Sutker v. Pennsylvania Insurance Co., 115 Ga.App. 648, 155 S.E.2d 694 (1967), the defendant insurance company's agent had told the plaintiff that an amendment to plaintiff's automobile policy substituting one car for another and adding uninsured motorist coverage would be made. The plaintiff was subsequently involved in an accident with an uninsured motorist. He sued the motorist and recovered judgment. He then sued the insurance company, which had not in fact issued the insurance coverage, for fraud and deceit. The defendant's demurrer to the petition was sustained and this ruling was affirmed on appeal. The court set out the elements of fraud in Georgia, which included the speaker's knowledge

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[7] An element of wilfullness, knowledge, or scienter is also required in actions in fraud or deceit in Georgia by statute. Ga.Code Ann. § 105-302 codifying the common law, provides:

> "*Wilful* misrepresentation of a material fact, made to induce another to act, and upon which he does act to his injury, will give a right of action. Mere concealment of such a fact, unless done in such a manner as to deceive and mislead, will not support an action. In all cases of deceit, *knowledge of the falsehood constitutes an essential element. A fraudulent or reckless representation of facts as true, which the party may not know to be false, if intended to deceive, is equivalent to a knowledge of the falsehood.*" (emphasis ours).

of the falsity of the representation. *Id.* at 700. *Accord,* Republic Mortgage Corp. v. Beasley, 117 Ga.App. 303, 160 S.E.2d 429, 433 (1968); Friendly Finance Company v. Stover, 109 Ga.App. 21, 134 S.E.2d 837, 839 (1964); Daugert v. Holland Furnice Company, 107 Ga.App. 566, 130 S.E.2d 763, 765 (1963); Snows Laundry & Dry Cleaning Co. v. Georgia Power Co., 61 Ga.App. 402, 6 S.E.2d 159, 161 (1939); Leatherwood v. Boomershine Motors, Inc., 53 Ga.App. 592, 186 S.E. 897, 898 (1936). As to the facts before it, the court in *Sutker* held the petition deficient, stating:

> "* * * In alleging that a defendant insurance agent was guilty of fraud and deceit in making misrepresentations concerning an insurance binder or amendment, it must be alleged in the context of this case, that the agent represented that he had issued the amendment or provided coverage when he knew that he had not, or that he promised that he would issue an amendment, when in fact he had no intention of doing so." *Id.* at 700.

The Georgia courts reacted similarly in the case of Whaley v. Holt, 110 Ga.App. 228, 138 S.E.2d 196 (1964). Plaintiff brought a fraud action, alleging that he had purchased an automobile from the defendant upon the representation that it was in good working order and that defendant either knew or should have known this representation to be false. The trial court sustained the defendant's demurrer to the petition and the appellate court affirmed, noting that knowledge of falsity is an essential element in a cause of action for deceit based upon fraud, *id.* at 197, and stating:

> "The petition is lacking at least in the essential averment that the defendants had actual knowledge of the defective mechanical condition of the automobile sold to the plaintiff. The petition alleges that the defendants 'knew or should have known the condition

of the car' and 'knew or should have known that said car was worthless for the purpose they sold it to this plaintiff.' These allegations assert at most a constructive knowledge on the part of the defendants and this is not enough." *Ibid.*

Numerous other cases could be cited for the proposition that scienter is an essential element in fraud actions for damages in Georgia.[8]

Against this wealth of authority, appellees, Cox and Crowe, have presented an informative, but to this Erie-bound[9] court, unpersuasive discussion of a modern judicial trend toward strict liability in tort as a result of advertising representations made to the public. Professor Prosser lists thirteen jurisdictions which have adopted this view, some only to a limited extent.[10] Georgia is not among these jurisdictions.

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[8] The following is a non-exhaustive listing. Hester v. Wilson, 117 Ga.App. 435, 160 S.E.2d 859 (1968); Blanchard v. West, 115 Ga.App. 814, 156 S.E.2d 164 (1967); Jackson v. Hatch, 115 Ga.App. 623, 155 S.E.2d 676 (1967); DeMayo v. Walton, *supra;* Whiten v. Orr Construction Co., 109 Ga.App. 267, 136 S.E.2d 136 (1964); Bagley v. Firestone Tire & Rubber Co., 104 Ga.App. 736, 123 S.E.2d 179 (1961); Dixie Seed Co. v. Smith, 103 Ga.App. 386, 119 S.E.2d 299 (1961); Wiseman Baking Co. v. Parrish Bakeries of Georgia, Inc., 103 Ga.App. 61, 118 S.E.2d 190 (1961); Hewlett v. Moore, 102 Ga.App. 506, 116 S.E.2d 660 (1960); Southern v. Floyd, 89 Ga.App. 602, 80 S.E.2d 490 (1954); Stovall v. Rumble, 71 Ga.App. 30, 29 S.E.2d 804 (1944).

[9] Erie Railroad Co. v. Tompkins, *supra.*

[10] "The first major recognition of strict liability came, however, in 1934, when the Washington case of Baxter v. Ford Motor Company [179 Wash. 123, 35 P.2d 1090] held that a statement, in the literature distributed by the maker of an automobile, that the glass in his windshield was 'shatterproof' made it liable, without scienter or negligence, to one who bought the car from a dealer and was injured when a pebble struck the glass and shattered it.

This decision has been followed, and there are now some thirteen jurisdictions which have accepted the strict liability

Several Georgia cases are cited for the proposition that negligent advertising gives rise to a cause of action in Georgia. However, the cases cited are in fact products liability cases where the making of representations gave additional grounds for holding defendants liable. In King Hardware Company v. Ennis, 39 Ga.App. 355, 147 S.E. 119 (1929), a stove which was sold to plaintiff exploded after the defendant had told plaintiff that it was impossible for the stove to explode. The Court held the petition not subject to dismissal simply because it failed to allege that the defendant knew that the stove was defective. First the court stated that apart from the representation made by the defendant, "the defect was one which a reasonably prudent dealer should have discovered before placing it (the stove) upon the market and delivering it to a customer." *Id.* at 122. Alternatively, and as dictum, the court said:

> "* * * even if it could be said that the petition fails to allege any facts to show a duty * * * to have known of the defective character of the instrumentality, provided no representations were made, * * * (i)t certainly could not be held that they were without a duty of discovering the defect when they assumed to represent that the stove was safe and could not explode. * * * (I)f a tradesman sells or furnishes an article, representing it to be safe for the uses for which it was designed, it may be concluded that he knew or should have known of such defects as it may possess, and, if it turns out that the article was defective, then, in a suit against him for injuries occasioned thereby, an allegation that he either knew or ought to have known of the defects will be sufficient as a charge of negligence in his failure to know." *Id.* at 123.

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for statements that prove in fact to be false, when they are made to the public in labels on the goods themselves, or in the sellers advertising or his disseminated literature and it can be found that the plaintiff relied upon such statements in making his purchase." Prosser, "The Assault Upon The Citadel," 69 Yale L.J. 1099, 1134 (1960).

In Chitty v. Horne-Wilson, Inc., 92 Ga.App. 716, 89 S.E. 2d 816 (1955), the court, overruling the sustaining of a demurrer, and citing *King Hardware, supra*, held that the seller of a chattel who makes representations as to its safety is liable for negligence in not discovering defects in the chattel. The Georgia courts have not extended this doctrine beyond the sale of defective chattel, where reliance on misrepresentations is the proximate cause of harm.

Consideration of the policy arguments propounded by appellees may be made to the legislature and courts of Georgia but for the time being we must give credence to the position taken by Georgia courts. Appellee, Cox, contends that there are no Georgia cases directly on the point involved in this case. To an extent he is correct. We have found no Georgia cases on scienter requirements in suits involving advertising representations as to proper insurance by car rental companies. However, the abundance of statutory and case law already cited clearly establishes a generally accepted principal of substantive law which we are constrained to follow. Jackson v. Sam Finley, Inc., 366 F.2d 148 (5 Cir. 1966). We must view the entire panorama of Georgia cases rather than focus on isolated language from a few distinguishable cases. Fulton National Bank v. Tate, 363 F.2d 562, 575, 576 (5 Cir. 1966).

Georgia law is clear. Scienter is an essential element in actions for damages based upon fraud. Since the district court failed to instruct the jury on scienter we must reverse.[11] Hertz contends that there is not even a

[11] The district court instructed the jury regarding defendant's representation as follows:

"Now, next I direct your attention to the second feature of the case loosely termed as that of insurance coverage. Now, in this matter both Miss Crowe and Mr. Cox contend that the Hertz Corporation made representations through advertising and otherwise which they relied on to their detriment.

thread of evidence in the record regarding bad faith or moral guilt, *i. e.* scienter, on the part of Hertz. Hertz contends that we should therefore reverse the judgment below and render judgment for Hertz. We disagree. Scienter is an issue of fact for the jury. There was evidence introduced below upon which the jury could, had it been so instructed, have found requisite scienter. Specifically we refer to the fact that Hertz discontinued a line of advertising which the jury concluded appellees relied upon to their detriment. Further, Hertz was responsible both for its insurance coverage in the Bahamas and its advertising policies in the United States. If the two were in conflict, which the jury concluded they were, the jury could have inferred that Hertz knew of the discrepancy.

For these reasons we reverse and remand the case to the district court for new trial and proceedings in accordance with this opinion.

Generally speaking, where representations are made to the public at large, or to a particular class of persons, with the intention of influencing any member of the public or of the class to whom they may be communicated, anyone injured through a proper reliance thereon may secure redress. In such a case it is not necessary that a representation be made fraudulently or negligently, but the representation must, of course, be intended for the public or for a particular class of persons to which the complainant belonged.

From this general principle and statement of law it can be seen that there are several different facts which must be ascertained in cases of this kind:

First, was any representation as claimed made?

Second, was it important and material to the transaction, and what did it really mean?

Third, did the complainants here, of course, Both Miss Crowe and Mr. Cox, have a right to rely on them?

And, lastly, did either or both of them, in fact, rely on them?"

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

FEBRUARY 2, 1971

No. 26251

THE HERTZ CORPORATION,

Plaintiff-Appellant,

v.

DONALD COX AND SARAH C. CROWE,

Defendants-Appellees.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before WISDOM and DYER, Circuit Judges, and KRENTZMAN, District Judge.

PER CURIAM:

The Petition for Rehearing is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied, 5 Cir., 430 F.2d 1365.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-1573

SARAH CROWE HARRIS AND DONALD COX,

Plaintiffs-Appellees,

v.

THE HERTZ CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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JANUARY 26, 1973

Before BROWN, Chief Judge, THORNBERRY and MORGAN, Circuit Judges.

PER CURIAM: The basic facts in this case are clearly stated by this court in a prior opinion and we feel no need to reiterate them here. *The Hertz Corporation* v. *Cox & Crowe,* 5 Cir. 1970, 430 F.2d 1365.

This case was heard and reversed twice previously by this court. The first appearance was the appeal by the plaintiff Miss Crowe, now Mrs. Harris. In that initial appeal this circuit reversed the granting of a summary judgment by the trial court on an affidavit that Hertz was not doing business in the Bahamas at the time of the plaintiff's injury. *Crowe* v. *Hertz Corporation,* 5 Cir. 1967, 382 F.2d 681. The case then proceeded to trial and resulted in a verdict for the plaintiff, Mrs. Harris, for $205,000.00. The Hertz Corporation appealed that ver-

dict to this court. This court again reversed, this time for the sole reason that the issue of scienter was not submitted to the jury by the trial court below. *The Hertz Corporation* v. *Cox & Crowe*, supra.

The court feels that several points of error raised by Hertz at this time have already been considered by this court in those two previous appeals and are now established as the law of the case. This court will consider here only the matters arising from the most recent trial proceeding in addition to the previous question of scienter.

We affirm the decision of the trial court for reasons set out below and for reasons stated in prior opinions of this court.

I

This court on the most recent appeal of this case found only one basis for a new trial. That reason was the district court failed to instruct the jury on scienter, supra at page 1377. Upon examination of the most recent trial proceedings there is no doubt that the evidence presented was sufficient for a jury to find scienter present and that proper instructions were given to the jury by the trial judge. The trial judge went on to issue special interrogatories to guarantee specific consideration of scienter by the jury. The jury did so consider the question and its findings as to the facts are conclusive.

II

The only new matter that Hertz presented concerns the testimony of Mr. Cox during the trial and a motion made by Hertz at that time.

While being questioned by the plaintiff's attorney, Mr. Cox was asked whether he had been able to pay the judgment Miss Crowe had against him. Mr. Cox answered

no. Hertz then moved for a mistrial. This court, after carefully scrutinizing the occurrences during the trial and the curative instructions given by the trial judge to the jury, finds no error can properly exist as regards this matter. The trial judge's cautionary instruction and his later charge to the jury concerning this testimony this court finds to be more than adequate to have prevented prejudice to Hertz.

AFFIRMED.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-1573

SARAH CROWE HARRIS AND DONALD COX

Plaintiffs-Appellees,

v.

THE HERTZ CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING

(February 23, 1973)

Before BROWN, Chief Judge, THORNBERRY AND MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

In The

UNITED STATES DISTRICT COURT

E. D. Missouri, E. D.

No. 60 C 404(1)

Betty Jeanne Stearns and Howard Lavelle Sutton,

Plaintiffs,

v.

The Hertz Corporation, a corporation,

Defendant.

July 12, 1962

HARPER, Chief Judge.

This is a diversity action brought by Betty Jeanne Stearns, a citizen and resident of Missouri, and Howard Lavelle Sutton, a citizen and resident of Illinois, against The Hertz Corporation, hereinafter referred to as Hertz, a Delaware corporation, which does not have its principal place of business in Missouri. Since the amount in controversy exceeds $10,000, exclusive of interest and costs, this court has jurisdiction under Title 28 U.S.C.A. § 1332.

The case was heard before this court without a jury. It was agreed by the parties that the law of Illinois is the applicable law in this case.

The testimony discloses that on January 4, 1956, the plaintiffs were working in Chicago as a dance team. Plaintiff Stearns received word that her mother was seriously ill in St. Louis, Missouri, and she was very desirous of reaching St. Louis at the earliest possible time. There were no adequate plane or train accommodations available for several hours, and it was decided by the plaintiffs that

a car would be rented and the plaintiff Sutton would drive both of them to St. Louis. Sutton had previously seen advertising of the defendant which was engaged throughout the country in the car rental business. He knew that the defendant had a car rental agency near the hotel where the plaintiffs were staying. These factors entered into Sutton's decision to rent the car from the defendant. At defendant's car rental agency Sutton dealt with Martin F. Benson and informed him of his intended use of the car.

On direct examination Sutton testified that he asked Benson if it were necessary to take out additional insurance, and was advised by Benson that it was not necessary, as Hertz furnished $25,000/$50,000 liability coverage, $5,000 property damage and $100 deductible collision coverage. The more credible testimony, however, with respect to what occurred at the defendant's office was the testimony of Sutton on cross-examination, at which time he testified that when he went to the car rental agency office he was in a hurry; that he didn't question Benson about insurance, but was told by Benson that $25,000/$50,000 liability coverage, $5,000 property damage and $100 deductible collision coverage was provided, as well as fire and theft; and that he did not inquire about the details of the insurance nor was it discussed and that he assumed he was completely covered.

Sutton drove back to the hotel and picked up plaintiff Stearns. They thereafter proceeded to St. Louis. Somewhere near Lincoln, Illinois, the car left the road, upset and turned over, seriously injuring plaintiff Stearns. Sutton, a few days later, notified Hertz of these occurrences. Thereafter, Hertz sent Sutton a green copy of the rental agreement, to which was attached a statement that the accident claim was being duly processed.

Plaintiff Stearns brought suit against Sutton in March 1956 for the injuries sustained. Upon being served with

summons, Sutton forwarded the same to Hertz. He received a letter from Continental Casualty Company advising him that its policy with Hertz excluded coverage for passengers in the car. Sutton answered this letter by stating that he considered himself entitled to insurance coverage from Continental and Hertz, and intended to hold them responsible for such coverage.

Plaintiff Sutton employed counsel, who defended the suit, after calling upon Hertz and Continental for assistance. Plaintiff Stearns obtained judgment against Sutton in the amount of $18,000 and $30.35 court costs.

At the time he rented the car Sutton did not read the rental agreement when he signed it, nor did he remember if he received a copy. The agreement provided for exclusion of passengers from the insurance provided. Among the advertising of Hertz, with which Sutton was familiar, was an ad which stated:

> "Low Hertz rates include all gasoline, oil and *proper insurance* * *. Public Liability, Property Damage, Fire and Theft Insurance, $100.00 deductible collision protection * * at no extra charge." (Emphasis added.)

This advertisement appeared throughout the country.

Chapter 95½, S-H Ill.Rev.Statutes, Section 63, makes unlawful the car rental business unless there is in effect:

> (1) A motor vehicle liability policy * * * providing that the insurance carrier will pay any judgment within thirty days after it becomes final, recovered against the customer * * * for damage to property other than to the rented motor vehicles, or for an injury to, or for the death of *any person, not an occupant* of the rented motor vehicle, resulting from the operation of the motor vehicle, provided, however, every such policy provides insurance insuring the operator of the rented motor vehicle against liability imposed by law upon such in-

sured for bodily injury to, or death of *any person* or damage to property to the amounts or limits as provided under Section 42-11 of this Act.

(or)

(2) A motor vehicle liability bond, conditioned that the owner of motor vehicle will pay any judgment within 30 days after it becomes final, recovered against the customer * * for damage to property other than to the rented motor vehicle, or for an injury to, or for the death of any person *not an occupant of the rented motor vehicle*, resulting from the operation of the motor vehicle, provided, however, every such bond is in the penal sum of eleven thousand dollars ($11,000) and is conditioned for payment in amounts as would be required in a motor vehicle liability policy as provided in Section 42-11 of this Act * * *." (Emphasis added.)

A casual reading of these sections would indicate that defendant Hertz need only provide insurance covering persons "not an occupant of the rented motor vehicle." See Gabler v. Continental Casualty Company, 295 S.W.2d 194, Mo.App. However, plaintiff seizes upon the proviso in subsection (1) which states: "Provided, however, every such policy provides insurance insuring the operator of the rented motor vehicle against liability imposed by law upon such insured for bodily injury to, or death of *any person* or damage to property * * *." Because the Illinois legislature omitted the phrase "not an occupant of the rented motor vehicle," plaintiffs contend that it intended to require coverage of any person.

Plaintiffs argue that that subsection (1) deals only with satisfaction of judgments, while the proviso deals with insurance. Therefore, the proviso is not inconsistent with the rest of the section. While plaintiffs' contention is literally true, such a construction would lead to absurd results. First, such a construction would require this court to find

that the legislature intended the proviso to enlarge the coverage of the rest of the subsection, although provisos generally except something from the enacting clause. 82 C.J.S. Statutes § 381, p. 883; Anderson v. City of Park Ridge, 396 Ill. 235, 72 N.E.2d 210, 213. Secondly, it would require this court to find that the legislature intended the insuror to satisfy all judgments within thirty days, except those involving an injury to a passenger. There is no logical basis for this contention. Third, subsection (2) which allows the defendant to furnish a bond instead of insurance, clearly provides that the bond be conditioned to pay judgments to persons "not an occupant of the rented motor vehicle." Thus, plaintiffs' construction would require this court to find that the legislature intended to require broader coverage when insurance was procured, than when a bond was posted.

Thus it appears that the Illinois legislature did not by the proviso enlarge the statute, but, rather, unintentionally omitted the phrase "not an occupant of the rented motor vehicle" from the proviso. Therefore, defendant has fully complied with the Illinois statute.

Plaintiffs further contend that Benson's statement that Hertz furnished $25,000/$50,000 liability coverage and $5,000 property damage created an obligation to furnish coverage in this amount for injuries to any person. However, this oral statement, even if it could be construed as suggested by plaintiffs, could not be used to vary the terms of the written rental agreement, which unequivocally excludes coverage for passengers.

The Illinois Supreme Court in Davis, et al. v. Fidelity Fire Ins. Co. of Baltimore et al., 208 Ill. 375, 70 N.E. 359, had this to say, l. c. 362:

> "The law is well settled that, when parties reduce to writing their agreement as finally agreed upon by

them, all prior negotiations leading up to the execution of the writing are merged in the writing, and that parol evidence is not admissible to explain, contradict, enlarge or modify the writing as it exists when executed. The writing, when executed becomes the repository of the agreement between the parties. In Memory v. Niepert, 131 Ill. 623, 23 N.E. 431, on page 630, 131 Ill., and page 432, 23 N.E., it is said: 'Where parties have deliberately put their contract into writing, the rule doubtless is that the writing is the exclusive evidence of what the contract is.' And in Clark v. Mallory [citation] 185 Ill. 227, 56 N.E. 1099 (page 232, 185 Ill., and page 1100, 56 N.E.): 'While courts will uniformly endeavor to ascertain the intention of the parties in construing a contract between them, and for that purpose will look into the surrounding circumstances at the time the contract was executed if the language of the instrument is ambiguous or its meaning uncertain, still, when the language employed is unequivocal, although the parties may have failed to express their real intention, there being no room for construction, the legal effect of the instrument will be enforced as written. Intention of the parties is not to be determined from previous understandings or agreements, but must be ascertained from the instrument itself which they execute as their final agreement, otherwise written evidence of an agreement would amount to nothing.'"

This decision has been cited many times since by the Illinois courts and other courts, one of the more recent citations being Lockwood v. Goldman, 345 Ill.App. 324, 102 N.E. 828.

There are some exceptions to the above rule, the general exception being one of fraud, but there is nothing in the testimony in this case in any way that would make the contract an exception to this general rule.

Plaintiffs also contend that Hertz' advertising binds it to furnish "proper insurance." However, under the

circumstances, "proper insurance" cannot be construed to include coverage other than required by Illinois law, and the insurance provided complied with the Illinois law.

Plaintiffs' final contention is that because of the extreme difference in bargaining position between Hertz and Sutton, this court should find that the clause excluding coverage to occupants of the car violates the public policy of Illinois. In support of this proposition plaintiffs cite Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 75 A.L.R. 2d 1. However, the Henningsen case, and other similar cases have validity only where because of a stronger bargaining position a party is able to frustrate a clearly defined public policy. For example, in the Henningsen case the parties contracted away statutory implied warranties. However, it has been shown that there is no clearly defined public policy requiring coverage of passengers of an automobile. Quite to the contrary, as previously stated, it is clear that Illinois intended not to require this coverage. The Henningsen rationale cannot be used by this court for the purpose of rewriting the contract of the parties.

The court will accordingly find in favor of the defendant in this case.

This memorandum opinion will be adopted by the court as its findings of fact and conclusions of law, and the clerk will prepare the proper order to be entered by the court.

IN THE

UNITED STATES COURT OF APPEALS

EIGHTH CIRCUIT

JANUARY 14, 1964

No. 17291

BETTY JEANNE STEARNS AND HOWARD LAVELLE SUTTON, *Appellants,*

v.

THE HERTZ CORPORATION, a corporation, *Appellee.*

Before VAN OOSTERHOUT and BLACKMUN, Circuit Judges, and HANSON, District Judge.

BLACKMUN, Circuit Judge.

The plaintiff Betty Jeanne Stearns was seriously injured in the early morning of January 4, 1956, when the automobile in which she was a passenger turned over. The car was being driven by the plaintiff Howard L. Sutton, was owned by the defendant Hertz Corporation, and had been rented by Hertz to Sutton that morning. The rental agreement was signed and the accident occurred in Illinois. It is conceded that the law of that state governs.

Miss Stearns sued Sutton in a Missouri state court. He called upon Hertz and its insurer to defend. They refused. Sutton thereupon retained his own counsel and defended the action. Miss Stearns obtained a judgment against him for $18,000. She and Sutton, asserting that Hertz is liable for the amount of her judgment, then together brought the present diversity action against Hertz. The trial court decided in favor of the defendant. Its memorandum opinion is reported at 211 F.Supp. 506. The plaintiffs have appealed.

The plaintiffs argue here that the trial court erred (a) in not holding that the presence in the Hertz insurance policy of a clause excluding coverage for bodily injury sustained by a passenger in the rented car violated the applicable Illinois statute; (b) in not holding that an implied contract existed by which Hertz was bound to furnish coverage for bodily injury to an occupant; and (c) in not holding that the exclusionary clause was against public policy and therefore void and unenforceable.

Judge Harper's opinion sets forth the pertinent facts and the reasons underlying his conclusions. We can add little to what he has already said. We treat only the particular emphases made on the appeal.

1. The state statute. In effect at the time of the accident was an Illinois statute, now found as § 8-114, Ch. 95½, Smith-Hurd Illinois Annotated Statutes. We quote it by footnote.[1] The agreement by which Sutton rented the car from Hertz contained provisions, pertinent here, which

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1 "§ 42e. It is unlawful for the owner of any motor vehicle to engage in the business * * * of renting out such motor vehicle, to be operated by the customer, unless * * * there is in full force and effect * * *

"(1) A motor vehicle liability policy * * * providing that the insurance carrier will pay any judgment within thirty days after it becomes final, recovered against the customer * * * for damage to property other than to the rented motor vehicles, or for an injury to, or for the death of any person, not an occupant of the rented motor vehicle, resulting from the operation of the motor vehicle, provided, however, every such policy provides insurance insuring the operator of the rented motor vehicle against liability imposed by law upon such insured for bodily injury to, or death of any person or damage to property to the amounts and limits as provided under Section 42-11 of this Act. * * * or

"(2) A motor vehicle liability bond, conditioned that the owner of motor vehicle will pay any judgment within thirty days after it becomes final, recovered against the customer * * *

are also set forth in the margin.[2] Judge Harper concluded, p. 508 of 211 F.Supp., that a casual reading of the statute indicated that Hertz need only provide insurance covering persons "not an occupant of the rented motor vehicle"; that the absence of this quoted phrase from the proviso clause of subsection (1) does not, because of absurd results which would otherwise ensue, indicate a legislative intent to require coverage of any person; and that the omission of the phrase in the proviso was unintentional.

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[2] "(4) Renter being one of the assured under the insurance policy covering said vehicle agrees to comply with all the terms and conditions of said policy, which by reference thereto are incorporated herein and made a part thereof, and to comply with the terms and conditions appearing on reverse side hereof.

"(5) Renter further expressly agrees to indemnify the Insurance Company for any and all loss, damage, cost and expense paid or incurred by the Insurance Company because of injuries or damages sustained by occupants of said vehicle, in states where the law makes Hertz or its Insurance Carrier liable for injuries to occupants of said vehicle or because of injuries or damages resulting from the operation of said vehicle in violation of any of the terms and conditions appearing on the reverse side hereof.

* * * * *

"SEE REVERSE SIDE"

On the reverse side of the contract as printed was the following:

"The renter of the automobile described on the reverse side hereof participates in the benefits of an automobile public liability and property damage insurance policy subject to the terms, conditions, limitations and restrictions thereof and is bound by such terms, conditions, limitations and restrictions even though all of them are not outlined in this rental agreement. Said policy does not cover the renter or driver for injuries sustained by passengers or guests or any person while riding in or alighting from or getting into or on said vehicle * * *"

---

for damage to property other than to the rented motor vehicle, or for an injury to, or for the death of any person not an occupant of the rented motor vehicle, resulting from the operation of the motor vehicle, provided, however, every such bond is in the penal sum of eleven thousand dollars ($11,000.00) and is conditioned for payment in amounts as would be required in a motor vehicle liability policy as provided in Section 42-11 of this Act."

The plaintiffs call to our attention here the fact that the proviso clause of subsection (1) was added to the statute by an amendment in 1947. It is then argued that this was a deliberate and separate change; that, despite the exclusion of coverage for occupants under the primary clause of sub-section (1) and under sub-section (2), the statute must now mean what it says, namely, that insurance as to any person must be provided; and that the 1947 amendment thus extended the coverage to, specifically, injuries for which the renter was liable but which the injured party could not collect.

We do not agree. We may accept the plaintiff's premise that a motor vehicle responsibility statute usually represents the public policy of a state and points to a liberal interpretation of insurance requirements and coverages. New York Cas. Co. v. Lewellen, 184 F.2d 891, 894 (8 Cir. 1950); Chatfield v. Farm Bureau Mut. Auto. Ins. Co., 208 F.2d 250, 256 (4 Cir. 1953); see People of Illinois ex rel. Terry v. Fisher, 12 Ill.2d 231, 145 N.E. 2d 588, 592 (1957). But the reasons mentioned by Judge Harper for his conclusions as to this defective statute, contrary to the plaintiffs' contentions, are inescapable, viz., (a) that a statute's proviso clause is generally restrictive and not extending, Anderson v. City of Park Ridge, 396 Ill. 235, 72 N.E.2d 210, 218-219 (1947); Illinois Chiropractic Soc'y v. Giello, 18 Ill.2d 306, 164 N.E.2d 47, 51 (1960); (b) that it would be illogical if sub-section (1) were to require that judgments be satisfied within thirty days except those involving an injury to a passenger; and (c) that sub-section (2) relating to the alternate liability bond clearly excludes passenger coverage and it would make no sense to conclude that sub-section (1) relating to liability insurance requires broader protection. "Courts are bound to presume that absurd consequences were not contemplated by the legislature * * *". Board of Education, etc. v. Brittin,

11 Ill.2d 411, 143 N.E.2d 555, 557 (1957); Illinois Chiropractic Soc'y v. Giello, supra, p. 51 of 164 N.E.2d. Further, it seems obvious to us that this proviso, with its reference to § 42-11, was concerned only with amounts of coverage; the words which the 1947 amendment replaced were themselves concerned only with coverage limits.

Next, we do not interpret the statute's references to § 42-11 (now succeeded by § 7-317, Ch. 95½, Smith-Hurd Illinois Annotated Statutes) as imposing the omnibus coverage requirements of the Illinois Safety Responsibility Law upon Hertz's rental agreements. The plaintiffs' apparent suggestion to the contrary is answered by Gabler v. Continental Cas. Co., 295 S.W.2d 194 (Mo.App.1956), the holding in which was approved in State Farm Mut. Auto. Ins. Co. v. Ward, 340 S.W.2d 635, 638 (Mo.Sup.1960). Although Gabler was decided by a Missouri court, the accident in controversy occurred in Illinois. The car rental policy had a passenger exclusion. The Illinois as well as the Missouri law was reviewed. The court held that the Illinois Safety Responsibility Law was not applicable because the rental contract was executed prior to the accident; that the parties were free to contract for insurance which excluded liability to a passenger; and that the exclusion was plain, unambiguous, and enforceable. Interestingly enough, the court noted, footnote 1, p. 196 of 295 S.W.2d, the exclusion of passenger liability in the Illinois car rental insurance statute. This approach is entirely consistent with the Illinois decisions. McCann for Use of Osterman v. Continental Cas. Co., 6 Ill.App.2d 527, 128 N.E.2d 624, 626-627 (1955), aff'd 8 Ill.2d 476, 134 N.E.2d 302 (1956); Pohlman v. Universal Mut. Cas. Co., 12 Ill.App.2d 153, 138 N.E.2d 848, 850; Stollery Bros. v. Inter-Insurance Exchange, 15 Ill.App.2d 179, 145 N.E.2d 768, 770-771 (1957); Porterfield v. Truck Ins. Exchange, 28 Ill.App.2d 195, 171 N.E.2d 108, 110 (1960).

The plaintiffs' suggestion that a "possible explanation" of the 1947 amendment was the legislature's desire to bring the statute into line with the state's guest statute, § 42-1 (now § 9-201, Ch. 95½), authorizing recovery by a passenger against a driver in a situation of causative, willful and wanton misconduct is supported by no authority. It is speculative and has no merit. See Johnson v. Universal Auto. Ins. Ass'n, 124 So.2d 580, 582 (La.App.1960).

Plaintiffs' attempt to buttress their statutory purpose argument with a state legislator's affidavit produced for the first time in an appendix to their appellate reply brief is of no consequence. In addition to serious questions of admissibility and of persuasiveness, Eddy v. Morgan, 216 Ill. 437, 75 N.E. 174, 178 (1905); Lubezny v. Ball, 322 Ill.App. 78, 53 N.E.2d 988, 993 (1944), reversed on other grounds 389 Ill 263, 59 N.E.2d 645 (1945); see FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 553, 80 S.Ct. 1267, 4 L.Ed.2d 1385 (1960) and United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 349, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963); cf. Kansas City, Mo. v. Federal Pac. Elec. Co., 310 F.2d 271, 280 (8 Cir. 1962), cert denied 371 U.S. 912, 83 S.Ct. 256, 9 L.Ed.2d 171 and 373 U.S. 914, 83 S.Ct. 1297, 10 L.Ed.2d 415, the affidavit is not to be considered here because it was not presented to the trial court. The appeal is to be determined upon the record below. Watson v. Rhode Island Ins. Co., 196 F.2d 254, 256 (5 Cir. 1952).

2. The implied contract. This argument rests on alleged representations of Hertz's rental agent Benson and on Hertz's advertisements.

The plaintiffs stress the fact that Sutton testified that Benson told him it was not necessary for him to take out additional insurance. But Benson in his deposition testified that he did not tell Sutton he was fully covered with liability insurance or that it was unnecessary for him to obtain

other coverage; he said that he did not recall that Sutton asked him any question at all about insurance. We therefore are in the usual situation of conflicting testimony. The district court found "more credible" Sutton's own concessions on cross-examination; these are to the effect that he was in a hurry, that he did not know whether or not he had read the contract, that he did not inquire of Benson as to passenger coverage, and that he assumed he was covered "for anything that might possibly happen". With the record in this state we, as an appellate court, cannot undo the trial court's findings for they are obviously not clearly erroneous within the meaning of Rule 52(a), F.R.Civ.P. The situation is far different from the case of Carlson v. Grimsrud, 223 Wis. 561, 270 N.W. 50 (1936), cited by the plaintiffs, where the court held that the evidence was sufficient to sustain the trial court's finding, opposite to the one here, that the insurer had agreed to issue its policy without the exclusionary clause. Furthermore, as Judge Harper observed, the matter was reduced to clear and unambiguous written terms and, in the absence of fraud, that writing should control. Davis v. Fidelity Fire Ins. Co., 208 Ill. 375, 70 N.E. 359, 362 (1904); Lockwood v. Goldman, 345 Ill.App. 324, 102 N.E.2d 828, 829 (1952).

Although Sutton testified in very general terms about having seen several Hertz advertisements referring to insurance, he admitted on cross-examination that the only one he was positive about was one in the 1955 Hotel Red Book. This recited "Hertz low rates include everything. * * * That includes gasoline, oil * * * and Public Liability, Property Damage, Fire and Theft Insurance, and $100.00 deductible collision protection". Other ads spoke of "proper insurance". Here again we agree with the district court that the latter term is to be construed to mean the coverage required by the Illinois law. The insurance provided did comply with that law. Also, Hertz's policy outstanding at the time of the

accident satisfied the description in the Red Book advertisement, for, despite the exclusion, it provided public liability, property damage, fire and theft insurance and $100 deductible collision protection.

See generally on this point, McCann for Use of Osterman v. Continental Cas. Co., supra; Jennings v. Illinois Auto. Club, 319 Ill.App. 587, 49 N.E.2d 847 (1943); Automobile Underwriters v. Camp, 217 Ind. 328, 27 N.E.2d 370, 375 (1940), rehearing denied 28 N.E.2d 68, 128 A.L.R. 1024. We therefore find no basis for the plaintiffs' contention that an implied contract existed binding Hertz to furnish insurance coverage for bodily injury sustained by an occupant for the rented automobile.

3. Public policy. The plaintiffs base this point solely on Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 75 A.L.R.2d 1 (1960), and argue that the exclusion was not called specifically to Sutton's attention, that it was in small print and on the reverse side of the contract, and that there was a disparity in bargaining between Sutton and Hertz. Henningsen, however, is a case concerning an implied warranty of fitness of an automobile, a product and a dangerous instrumentality, and the defendant-manufacturer's disclaimer of this warranty by small print provisions in a purchase order. That fact situation is not at all the one before us. As we have already noted, the applicable Illinois statute specifically authorizes passenger exclusion in rented automobile insurance. Further, Sutton in his testimony made no complaint about the smallness of the type or his ability to read it. There is no overriding public policy of the kind with which the New Jersey court was concerned in Henningsen.

It is unfortunate, of course, that Miss Stearns, seriously injured without fault on her part, now finds herself without financial relief. The difficulty, however, lies primarily in

Sutton's lack of coverage and in the apparent uncollectibility of the judgment against him. Had Sutton owned an automobile and carried a standard owner's policy, coverage would have been afforded. But these facts are hardly the fault of Hertz. If a passenger in a rented car was to have been so protected, that was a matter for the Illinois legislature.

Affirmed.

SECTION 10 OF THE ROAD TRAFFIC ACT OF 1958 OF THE BAHAMAS

"(1) In order to comply with the requirements of this Part of this Act, a policy of insurance must be a policy which —

(a) is issued by a person who is *an authorized insurer* within the meaning of this Part of this Act; and

* * *

(c) in the case of any motor vehicle other than a public service vehicle, *and in the case of a self-drive vehicle*, insures such person, persons *as may be specified in the policy* in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road:

Provided that such a policy shall not be required to cover —

(i) except in respect of passengers who are lawfully being carried in a motor vehicle by reason of or in pursuant of a contract of employment, *liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which the claim arises* . . . .

* * *

(5) In this Act —

(a) "authorized insurer" means any assurance company or underwriter carrying on motor vehicle insurance business and authorised by the Governor in Council to undertake insurance business for the purposes of this Act; . . ."

SPECIAL INTERROGATORIES AND ANSWERS FROM FIRST TRIAL

I. On the Question of the Collision

1. Was Donald Cox grossly negligent in the operation of the vehicle in which Miss Crowe was a passenger?

YES

2. If so, was his negligence the proximate cause in whole or in part of Miss Crowe's injuries?

YES

3. What was the amount in dollars of her damages arising out of the collision?

$205,000.00

4. Was Mr. Cox operating the vehicle with the consent and permission of Caribbean Motor Holding Co. on June 8, 1965?

YES

II. On the Question of Insurance Coverage

5. Did the Hertz Corporation make any representation to the public through advertising or otherwise, concerning "insurance" coverage or "proper insurance" coverage?

YES

6. If so, were such representations of such nature and character as to reasonably justify reliance thereon, on the occasion in question on June 8, 1965, by

(a) Miss Crowe YES

(b) Mr. Cox YES

7. As reasonable persons, did Miss Crowe as a guest passenger or Mr. Cox as the driver of the car actually rely on any representations as to insurance on the occasion in question on June 8, 1965?

   (a) Miss Crowe YES

   (b) Mr. Cox YES

8. If such were made, did any representation of "insurance" or "proper insurance" mean:

   (a) That liability insurance coverage would be afforded to guest passengers in "HERTZ" vehicles rented to others in Nassau on June 8, 1965?

   YES

   (b) That liability insurance coverage would be afforded as is required by the laws and customs of Nassau on June 8, 1965?

   NO

9. If the answer to question 8(a) is "Yes", what limits of liability insurance protection for a passenger should have been afforded under the representations of The Hertz Corporation?

   UNLIMITED

SPECIAL INTERROGATORIES AND ANSWERS FROM SECOND TRIAL

I. ON THE QUESTION OF THE COLLISION

1. Was the plaintiff Cox operating the vehicle in question in this lawsuit on June 8, 1965, with the consent and permission of the car rental agency in Nassau, Bahamas?

YES

II. ON THE QUESTION OF FRAUDULENT MISREPRESENTATION

2. Did The Hertz Corporation fraudulently represent by advertising to the public that liability insurance coverage would be afforded to authorized drivers of Hertz rental cars for claims by guest passengers in said vehicles in the Bahama Islands in June 1965?

YES

3. If so, at the time of such advertising, was the Hertz Corporation acting with such knowledge that such advertising was untrue and with the purpose and intent to fraudulently deceive the public, including Mr. Cox and Mrs. Harris?

YES

4. If so, would Mr. Cox and Mrs. Harris have been reasonably justified in the exercise of ordinary care and common prudence in believing, based on such advertising, that they would be provided with such insurance coverage in the Bahama Islands in June 1965? As to Mr. Cox — YES

As to Mrs. Harris — YES

5. As reasonable persons, did the plaintiff Mrs. Harris, or the plaintiff Mr. Cox, actually rely in their actions on June 8, 1965, on any such representations as to insurance?

As to Mrs. Harris — YES

As to Mr. Cox — YES

III. ON THE QUESTION OF INSURANCE COVERAGE

6. If so, what limits of liability were promised by such ~~such~~ advertising for injury to one person?

UNLIMITED

AUTO LIABILITY INSURANCE REQUIREMENTS OF FOREIGN COUNTRIES

Country	(1) Is Insurance Compulsory?	(2) Bodily Injury[1]	(3) Does (2) Include Liability To Guest Passengers?[2]	(4) Property	(5) Source
Austria	Yes	$23,400/$70,200	Yes, except certain close relatives	$ 7,020	AFIA Guide[3]
Belgium	Yes	Unlimited	Yes, except close relatives	Unlimited	AFIA Guide
Denmark	Yes	$20,100/ Unlimited	Yes	$ 16,080	AFIA Guide
France	Yes	$101,000	Yes, except certain close relatives	$101,000	AFIA Guide
Great Britain	Yes	Unlimited	No	None	AFIA Guide
Greece	No	$16,800/$33,600	No	$ 20,160	AFIA Guide
Italy	No	$8,075/$24,225	No	$ 2,422.50	AFIA Guide
Norway	Yes	$28,100/ Unlimited	No	$ 14,050	Motor Insurance Bureau[4]
Portugal	No	$7,020	No	$ 7,020	AFIA Guide
Switzerland	Yes	$23,300/$69,000	Yes, except non-Swiss citizens domiciled abroad and riding in vehicle registered abroad		Decree on Road Traffic Third Party Liability and Insurance, Art. 30, et seq.
Alberta, Canada	No		No[5]		Best's p. 307-D[6]
New Brunswick, Canada	No		No[7]		Best's p. 325-D
Prince Edward Island, Canada	No		No[8]		Best's p. 338-D
Tasmania, Australia	Yes	Unlimited	$4,500/$45,000	Unlimited	The Traffic Act of 1925
Victoria, Australia	Yes	Unlimited	$4,500/$45,000	Unlimited	Motor Act 1958
Adelaide, Australia	Yes	Unlimited	Yes	None	Motor Vehicle Act 1959-63; Road Traffic Act 1961-63

[1] The amounts required in foreign currencies have been converted to American dollars as of October 1968 for purposes of this table. Where two amounts are shown, the first is the amount required per person and the second, the amount per collision. Where one amount only is shown, it is the amount required per collision without regard to the number of claimants. Where insurance is not compulsory, the amounts shown are either customary or recommended.

[2] If "No" appears in this column for a country which does not have compulsory insurance, passenger coverage is neither customary nor included in the standard policy.

[3] *AFIA Guide Europe* (April 1968) is a booklet published by the American Foreign Insurance Association, an organization composed of eight American insurance companies and having offices throughout the world. It is designated to aid Americans doing business and traveling abroad and their insurance agents in ascertaining the legal requirements and customs of foreign countries.

[4] The Motor Insurance Bureau of Europe is composed of most European governments. The Bureau publishes a report of the laws of members and non-member countries. The information as to Norway came from a 1964 report.

[5] "The subject of automobile insurance is governed by Part VII of the Alberta Insurance Act. *Under Section 296 of the Act certain risks are excluded from an Owner's policy or a Driver's policy. These are* — . . .(d) *for any loss or damage resulting from bodily injury to or the death of any person being carried in or upon or entering or getting on to or alighting from the automobile, . . .*"

[6] Best's Recommended Insurance Attorneys 1965-66.

[7] "*Insurer is not liable* under an owner's or driver's policy: (d) . . . *resulting from bodily injury to, or death of, any person being carried in or upon or entering or getting on to or alighting from the automobile, . . .*"

[8] Same as New Brunswick.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1559

THE HERTZ CORPORATION,
Petitioner,

vs.

DONALD COX and SARAH CROWE HARRIS,
Respondents.

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1559

THE HERTZ CORPORATION,
Petitioner,

vs.

DONALD COX and SARAH CROWE HARRIS,
Respondents.

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

Petitioner omitted the first and extremely important opinion of the United States Court of Appeals for the Fifth Circuit in this case. It is *Crowe, et al.* v. *Hertz Corporation*, 382 F 2d 681 (1967) and is included in respondents' Appendix.

QUESTION PRESENTED

In presenting its question to the Court, the petitioner has assumed legal conclusions which respondents respectfully submit are not correct. Respondents do not agree

that the Eighth Circuit, in deciding that there was no cause of action *ex contractu* in *Stearns* v. *Hertz Corporation*, 326 F 2d 405, has defined the term "proper insurance" to mean only that insurance required by the laws and customs of the place where a vehicle is rented and driven and that it is in conflict with the decisions of the Fifth Circuit Court in the instant case which is a cause of action *ex delicto* based on fraud and deceit.

REASONS FOR NOT GRANTING THE WRIT

The petitioner contends that the case of *Stearns* v. *Hertz Corporation*, 326 F 2d 405 (8th Cir. 1964) is in irreconcilable conflict with the decisions in this case. Respondents disagree and oppose the Petition on five grounds.

We respectfully submit that, first, the Stearns case does not hold that "proper insurance" means only the minimum insurance required under Illinois law; second, the case of *Stearns* v. *Hertz Corporation*, 326 F 2d 405 (8th Cir. 1964) differs from this case on its facts; third, it is immaterial, under *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S Ct 817, that laws of two states interpreted in Federal Circuit Courts differ. If, in fact, the 8th Circuit held in Stearns that Illinois law is that the minimum required by law is "proper insurance" that is certainly not the law of Georgia; and fourth, the law of the case was established so far as "proper insurance" is concerned by an earlier decision of the Circuit Court and could and should have been appealed then. Fifth, the point is moot because Hertz stopped advertising proper insurance in the late fifties.

GROUND ONE

Stearns Case Did Not Define "Proper Insurance"

In the Stearns case, the plaintiffs proceeded against Hertz on three theories: (1) that the passenger exclusion clause in the Continental policy provided by Hertz violated an Illinois statute; (2) that the renter, Sutton, had relied upon Hertz's advertisement of "proper insurance" as meaning passenger coverage, creating an implied contract, and (3) that the passenger exclusion clause was violative of the public policy of Illinois. The trial court, hearing the case without a jury, found that there was no contract to furnish passenger coverage and that the exclusion in the rental contract and in the policy was not violative of public policy.

The Stearns case proceeded on a theory of contract and warranty that Hertz had failed to provide what it had advertised and promised. The finder of fact (the Court without a jury) found against the plaintiffs. The language found in the trial court's decision of the Stearns case, *Stearns* v. *Hertz Corporation*, 211 F. Supp. 506 (E. D. Mo. 1962), reproduced on page A-32 of The Petition clearly shows that the trial court considered the case to be in contract. The Court's language is as follows:

> "Plaintiffs further contend that Benson's statement that Hertz furnished $25,000/$50,000 liability coverage and $5,000 property damage created an obligation to furnish coverage in this amount for injuries to any person. However, this oral statement, even if it could be construed as suggested by plaintiffs, could not be used to vary the terms of the written rental agreement, which unequivocally excludes coverage for passengers".

Judge Harper, in the next paragraph, cited an Illinois case, *Davis, et al.* v. *Fidelity Fire Ins. Co. of Baltimore, et al.*, 208 Ill. 275, 70 N E 359, which sets forth the rule that a written contract cannot be enlarged by parol evidence. Then the Court went on and made the point that distinguishes the Stearns case from this case as follows:

> "There are some exceptions to the above rule, the general exception being one of fraud, but there is nothing in the testimony in this case in any way that would make the contract an exception to this general rule." (A-33)

The holding in Stearns is simply that the plaintiffs therein could not recover *ex contractu*. It did not hold that "proper insurance" is the minimum required by law.

GROUND TWO

Cases Differ on Law and Facts

The present case against Hertz is one in tort for fraud and deceit. This is a statutory remedy in Georgia. Ga. Code Ann. §105-302.

The measure of damages for fraud and deceit is the actual damage sustained, 37 Am Jur 2d, Fraud and Deceit, §342 Generally, p. 458.

The Fifth Circuit Court distinguished the cases in the following language:

> "Hertz contends that Stearns is on all fours with this case and is not distinguishable. We disagree. In Stearns the misrepresentation occurred in Illinois, the rental agreement was signed in Illinois and the accident occurred in Illinois. It was conceded that the law of Illinois would control. *Id.* at 406. In

this case, while the rental agreement was signed in the Bahamas and the accident occurred in the Bahamas, the misrepresentations and the wrongs occurred in Georgia and Kentucky, respectively." *Crowe, et al.* v. *Hertz Corporation*, 382 F 2d 681. (R App. 7, 8).

There are other points of distinction between the two cases.

The Stearns case was in contract. The Stearns case sought to impose a contractual duty on Hertz by virtue of an Illinois statute; by an implied contract; and through public policy. Because the Eighth Circuit rejected these contentions, Hertz now says that the parties in this case are restricted to an insurance policy written under Bahama law which permits the issuance of liability policies on self-drive automobiles which excludes passengers.

A concise statement of the facts in this case was set out by Judge Tuttle in the first report, *Crowe* v. *Hertz Corporation*, 382 F 2d 681 (R App. 2).

As stated by Judge Tuttle, the substance of the complaint was that the defendant, The Hertz Corporation, held itself out, both by long, continuous and saturation type advertising to offer Rent-A-Car services throughout the world; that this service included complying with the highest standards of insurance coverage; . . . that Miss Crowe was entitled to the protection of a public liability insurance policy, both contracted for from the local agency and as held out under the policy actually issued for the protection of the drivers against liability claims of passengers and thus excluded any benefit to an injured passenger like Miss Crowe; that this exclusion was false and contrary to the representations contained in national advertisements of the Hertz Corporation and amounted to a fraud upon the renters of automobiles such as Cox, for

which recovery could be had for the benefit of the passenger. *Crowe* v. *Hertz Corporation*, 382 F 2d 681 (1967).

Petitioner conveniently overlooks the evidence that it told its stockholders, in 1964, that its advertising program assured the public that it had insurance of the "highest standards" and gave Hertz's assurance to each customer that he will be satisfied with "all phases of his car rental anywhere in the world." See *Crowe* v. *Hertz Corporation*, 382 F 2d 681 at p. 684. By its own admission, petitioner shows by 1964 it meant to go even farther than just "proper insurance."

The statement from the 1964 annual report of the Hertz Corporation quoted in Judge Tuttle's opinion, makes a much stronger case against Hertz than the evidence in the Stearns case, which is as follows:

> "'Certified Service' was vigorously merchandised during the year to emphasize the quality of Hertz Rent-A-Car. This program—an industry exclusive, backed up a pledge of $50 in car rental credits—sets the highest standards for equipment used, maintenance, appearance, cleanliness, insurance coverage and reservation reliability. It is Hertz's assurance to each customer that he will be satisfied with all phases of his car rental anywhere in the world". *Crowe* v. *Hertz Corporation*, 382 F 2d 681 at p. 684. (R App. 7).

The basic issue for determination in this case as set out by the Circuit Court's first opinion was whether or not a corporation could advertise itself as a worldwide corporation affording insurance of the highest standards to Americans wherever they might travel in the world, and avoid responsibility for its representations made through the various news media of the country by answering that it furnished the minimum required by law.

The rental agreement on the automobile involved in the collision was attached to the plaintiff's original complaint and was introduced into evidence. Page one of the agreement is attached hereto as a part of the appendix.

There is a considerable amount of printed matter on page one, of which the following is a part, to-wit:

> "7. The vehicle is covered by an automobile liability insurance policy, a copy of which is available for inspection at the main offices of Lessor upon request by customer. Said policy contains bodily injury or death liability, limits of $100,000.00 for each person in each accident, $300,000.00 for all persons in each accident, and property damage liabilities of $25,000.00 for each accident."

This statement, like the Hertz advertising, was false—no such policy of insurance existed. A policy without limits covered the automobile, but passengers were excluded. This rental contract stated that all persons were insured; while the contract in the Stearns case expressly excluded passengers.

In early discovery, the following interrogatories were submitted to defendant, The Hertz Corporation, regarding insurance, to-wit:

> "9. Was there a policy of liability insurance with limits of $100,000.00 for each person and each accident, $300,000.00 limits for all persons in each accident, property liability limits of $25,000.00 for each accident, in force covering the Vauxhall Victor 4 door sedan automobile in which plaintiff was injured on June 8, 1965?"

To this interrogatory, the defendant, by its vice-president, Mr. Reiter, answered:

"This defendant has no knowledge or information concerning the liability insurance, if any, on the automobile."

Another question followed:

"10. Give the names of any and all insurance companies having liability insurance coverage on said vehicle on June 8, 1965."

To the question, the defendant answered simply, "See answer to 9." (C. A. No. 2, p. 371).

These answers, we say, show a complete and utter disregard of the responsibility Hertz had assumed by its advertising. As can be seen by the advertisement described in the decisions in this case, along with the admission of Hertz's annual report, it had advertised worldwide that Hertz's automobiles were covered not just by insurance, but by "proper insurance", "public liability insurance", and insurance of the "highest standards." Yet, in these answers to interrogatories, it admitted that it did not even know whether there was insurance on this automobile. This statement alone, we submit, made a case of fraud and deceit.

GROUND THREE

Erie v. Tompkins Settled Differences

Under the rule laid down in the often cited case of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S Ct 817, we are only here concerned with Georgia law.

The Court of Appeals of the State of Georgia has frequently interpreted the word "proper" as modifying the word "lookout." In such instances, the Court has held that "proper lookout" is a matter to be interpreted under all the circumstances by a jury. In the operation of an automobile or airplane such questions are for the jury.

In *Citizens & Southern National Bank* v. *Huguley*, 100 Ga. App. 75, 77, 110 S E 2d 63, the Court stated "we have already seen that it *may* be gross negligence to fail to keep a proper lookout ahead." (Italics added).

Both the Court of Appeals of Georgia and the Supreme Court of Georgia have defined "proper care and diligence." "Proper care, reasonable care, and ordinary care and diligence are synonymous, and proper care is the equivalent of ordinary care." *A. & W. P. R. Co.* v. *Wyly*, 65 Ga. 121; *Ga. Power Co.* v. *Whitlock*, 48 Ga. App. 814, 174 S E 162.

The Supreme Court of the State of Georgia, in the case of *Sowell* v. *Sowell*, 212 Ga. 351, 92 S E 2d 524, discussed at length the distinction between a "proper party" and a "necessary or indispensable party".

The case was decided in 1956 when demurrers were still a part of our civil procedure in Georgia. The joinder or nonjoinder of proper parties were the subject of special demurrers while the failure to name a necessary or indispensable party left the petitioner without a cause of action and the court without jurisdiction and therefore, was the subject of a general demurrer. As to proper parties to a suit, the matter was left to discretion or choice.

The point of this analogy is that the word proper has been recognized by the courts of Georgia to mean something less than an absolute standard either maximum or minimum.

An examination of the definition of the word proper, in Webster's New International Dictionary, Third Edition, reveals that it has many meanings such as appropriate, fit, suitable, and right, but it certainly does not create an absolute standard.

By advertising proper insurance, Hertz did not set for itself an absolute minimum, but that which was reasonable and prudent.

As pointed out in the first decision of the Fifth Circuit Court, the evidence in this case was that it is common, customary and actually universal usage in Georgia that liability insurance policies cover guests and passengers in automobiles driven by one having expressed or implied permission of the owner or insurer (R App. 7, 9, 10).

It is interesting to see that the Fourth Circuit Court of Appeals has considered a policy almost identical to the policy in this case and found it to be substandard. It held in *Insurance Company of North America* v. *Atlantic National Insurance Company*, 328 F 2d 769, 771, that an automobile liability policy on a Hertz vehicle excluding coverage as to passengers or as to operation of an automobile in violation of a rental agreement was neither a "standard provision automobile liability policy", nor "substantially the equivalent", thereof under Virginia law.

GROUND FOUR

Law of the Case

This case has been in litigation since the summer of 1965. Although the Circuit Court of Appeals has decided this case twice before, Hertz did not appeal to this Court, but was content to allow the case to be remanded and retried. As defined by Mr. Justice O. W. Holmes, the law of the case expresses the practice of the Courts generally to refuse to reopen what has been decided. *Messenger* v. *Anderson*, 225 U. S. 436, 56 L. ed. 1152 (1912), 32 S Ct 739. Respondents recognize that this Court has ruled that it will not be bound, as a matter of law, by decisions of Courts of Appeals unappealed from in previous appeals.

Buster v. *Wright*, 135 F. 947, App. Dis. 203 U. S. 599, 27 S Ct 777, 51 L. ed. 334 (1905); *Diza A.* v. *Patterson*, 263 U. S. 399, 68 L. ed. 356 (1923), 44 S Ct 151; *Davis* v. *O'Hara*, 266 U. S. 314, 69 L. ed. 303 (1924), 45 S Ct 104; *Galpin* v. *Page*, 85 U. S. 350, 21 L. ed. 959. See the annotation at 41 ALR 1057, 1078. However, no reason appears or can appear why Hertz could not have sought a ruling by this Court on this exact point when it had the opportunity to do so on the previous appeals to the Fifth Circuit Court of Appeals. Petitioner has insisted at every stage of this case that it is controlled by Stearns. The case was cited no less than seven times in its first brief in the Circuit Court.

Its election to abide the previous decisions without appeal has caused respondents great expense and considerable delay in trying a long and difficult case. This type of deliberate delay is unnecessary, unfair and conducive to criticism of our judicial system.

GROUND FIVE

The Question Is Moot

The sole question presented by the petitioner is what meaning the term "proper insurance" should have. A conflict between decisions of the Fifth Circuit and the Eighth Circuit is alleged. No other reason is given to the Supreme Court in seeking review on Writ of Certiorari.

We respectfully submit that the question is now moot. "Proper insurance" has not been used in Hertz Advertisement since the late fifties. The general counsel for the Hertz Corporation testified at the last trial that the phrase "was insignificant in terms of sales or any other—for any other purposes." (C. A. No. 2, App. 530, 531, 537). The "impossible burden and uncertainty" created by the "rea-

sonable renter passenger definition" applied to "proper insurance" by the Fifth Circuit described in the Petition seems to us to be somewhat akin to the hysteria of Chicken Little.

CONCLUSION

The differences in results in the Stearns case and this case arise entirely upon differences of the facts as framed in the pleadings. The rental contract in Stearns described an insurance policy which excluded passengers. The contract in the instant case described a policy that covered passengers. The Stearns case sought relief *ex contractu* seeking to modify a contract which could not be done. The present case is an action *ex delicto* for fraud and deceit. These differences certainly present no "real and embarrassing conflict of authority by the Courts of Appeals" requiring review by this Court. *N. L. R. B.* v. *Pittsburgh SS Co.*, 340 U. S. 498, 95 L. ed. 479, 71 S Ct 453; *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 99 L. ed. 897, 75 S Ct 614.

Respectfully submitted,

JAMES I. PARKER
DONALD B. HOWE, JR.
WADE C. HOYT, JR.
Attorneys for Respondents

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23775

SARA C. CROWE, by and through L. L. CROWE, as next friend, and DONALD COX,
Appellants,

versus

THE HERTZ CORPORATION,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(June 19, 1967.)

Before TUTTLE, Chief Judge, AINSWORTH, Circuit Judge and FULTON, District Judge.

TUTTLE, Chief Judge: This is an appeal from a summary judgment dismissing a personal liability damage suit arising out of an injury suffered by the appellant in the Bahama Islands while she was riding in an automobile driven by the defendant, Donald Cox, rented by the latter from the local Hertz Rent-A-Car station. The appeal is joined by Cox, an original defendant, whose cross-complaint against Hertz was also dismissed by the order of the trial court.

The substance of the complaint was that the defendant, The Hertz Corporation, held itself out, both by long, continuous and saturation-type advertising to offer rent-a-car service throughout the world; that this service in-

cluded furnishing of the highest standard of insurance coverage; that Cox, together with two friends, rented a "Hertz" car for their use from a rent-a-car station bearing the "Hertz" sign and symbol under circumstances that made Cox an insured driver; that in driving the appellant, Miss Crowe, on the roads in the Bahamas, Cox was involved in a head-on collision with another car owing to his lack of knowledge of the local driving requirements that automobiles be driven on the left rather than the right side of the road; that Cox's negligent driving seriously injured the plaintiff;[1] that Miss Crowe was entitled to the protection of a public liability insurance policy, both contracted for from the local agency and as held out under the worldwide advertising by the defendant, Hertz Corporation; that the policy actually issued for the protection of the drivers of the rent-a-car system in the Bahamas excluded protection of the drivers against liability claims of passengers and thus excluded any benefit to an injured passenger like Miss Crowe; that this exclusion was false and contrary to the representations contained in national advertising of the Hertz Corporation and amounted to a fraud upon the renters of automobiles such as Cox, for which recovery could be had for the benefit of the passenger.

In his defense, Cox admitted the accident, but denied liability, contending that the accident was not due to his negligence. Cox also filed a third party claim over against the Hertz Corporation, reasserting the grounds of action as alleged by Miss Crowe and also relying upon the holding out by the national advertising of Hertz Corporation to him as a renter of a Hertz car.

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1. The allegations of the complaint showed that Miss Crowe had suffered brain damage and was unable to conduct the case on her own account, thus accounting for the suit being brought by her father as next friend.

In view of our conclusion that the trial court erred in summarily dismissing not only Miss Crowe's, but also Cox's claim against the Hertz Corporation, without determining whether there existed facts upon which relief could be granted in the event that Hertz was found to be a proper party defendant, we find it necessary to make a fairly full statement of the facts.

The following is a statement which the trial court found to be uncontradicted facts. The statement is taken from the opinion of the trial court.

On June 7, 1965, the defendant, Donald Cox, with Bill Grubbs and Aldo Bergomi went to a desk bearing a large sign, "Hertz Rent A Car" at the Sheraton British Colonial Hotel in Nassau, Bahama Islands, where an automobile was rented. It was a 1964 or 1965 model Chevelle red convertible.

The three of them talked with each other in the presence of the man at the desk about sharing the use, and cost, of the car rental and discussed with the man the rental cost, with and without insurance, and decided to contract to pay the "with insurance" rate. The man at the desk, so Cox believes, wore a shirt or uniform with a parallelogram "Hertz" on it. Donald Cox believed that the three of them rented the automobile jointly, but only Bergomi signed the rental agreement.

Cox drove the rented car away from the rental agency on the afternoon of June 7, 1965, and the three of them took turns driving about the island. That night Cox and Grubbs used the car. Bergomi was not along. Cox and Grubbs returned the keys to the "Hertz" desk at the hotel that night. Bergomi, Cox and Grubbs divided the costs of renting the car.

Late the next day, on June 8, 1965, Bergomi told Grubbs and Cox that he wanted to again rent a car and asked them if they wished to "go in on it", and they agreed to share the use and expense of the car. Bergomi went alone and rented a Vauxhall 4-door sedan and the three boys drove the three Crowe girls about the island.

On the evening of June 8, 1965, Cox and the plaintiff, Sara Crowe went out in the car together and at about 11:30 P.M. were involved in a headon collision with another automobile and the plaintiff was injured.

After the accident the wrecked car was towed to a large fenced in lot bearing a large "Hertz" sign and there stored.

The Hertz signs were the same type as used by the Hertz Corporation in their advertising in the United States.

After the occurrence here involved, Mr. James I. Parker visited Nassau, and a "Hertz" Rent A Car station nearby and photographed the station, which bore "Hertz Rent A Car" signs.

On March 23, 1966, counsel for plaintiff, Harold L. Murphy, along with associate counsel, James I. Parker, went to the office of Hertz Rent A Car in Nassau, Bahamas, to interview its manager, Terry Morrissey, and while waiting for him, Mr. Murphy picked up from the ground to the rear of the offices certain receipts and certain rental car invoices showing the front and back of rental contracts.

Mr. Murphy examined the agreements found there with rental agreements issued by offices of the Hertz Corporation in the United States, and the rental agreement issued upon the automobile in which plaintiff was riding at the time of her injury, and in each instance found page one to be identical, and page two to be identical except

for the filled in information as to type of car, charges, time, etc.

At the time of Murphy's visit to "Hertz Rent A Car" Nassau, Bahamas, he acquired a Hertz Rent A Car reservation entitled Hertz Reservation Office, 660 Madison Avenue, New York, N. Y., reserving an automobile for a customer arriving at Nassau, Bahamas, on March 10, 1966, which address is also that of the executive offices of the Hertz Corporation as shown in the 1964 annual report of the Hertz Corporation.

At the office of Hertz Rent A Car in Nassau, "Hertz Rent A Car" signs were prominent in several places as were the same type signs in two rental station places in down town Nassau. This is the same type sign that appears on rental agreements issued by the Hertz Corporation and its licensees in the United States.

Murphy obtained at the Hertz Rent A Car office in Nassau a Hertz circular advertising Hertz Rent A Car and Hertz Service in Nassau— "We'd like to show you Nassau. Let Hertz put you in the driver's seat," etc. "Just give us a call at 77366 or 23496 and watch Hertz in action."

Van G. Hunt, an expert on American automobile liability insurance, has read advertisements displaying the Hertz Rent A Car in a parallelogram familiar to him as the Hertz trademark, which advertisements contain the language, "Rental fees include—all gasoline, oil . . . public liability, property damage, fire and theft insurance, and $100 deductible collision protection", and which state Hertz low rates cover everything including $100 collision protection. Hunt also read in the 1964 Annual Report of the Hertz Corporation:

> " 'Certified Service' was vigorously merchandised during the year to emphasize the quality of Hertz Rent

A Car. This program—an industry exclusive, backed up a pledge of $50 a car rental credits—sets the highest standards for equipment used, maintenance, appearance, cleanliness, insurance coverage and reservation reliability. It is Hertz's assurance to each customer that he will be satisfied with all phases of his car rental anywhere in the world."

It is Mr. Hunt's opinion that "proper insurance" includes adequate public liability insurance to cover personal injury caused by the negligence of an insured driver to protect him from claims of persons who might be struck by the automobile or injured while riding therein as a passenger.

"According to custom, practice and usage in the insurance industry, bodily injury liability insurance is considered the most important coverage in the field of automobile insurance and would certainly be included in 'proper insurance'.

"According to common usage and custom in the insurance industry, bodily injury liability insurance covering passengers of an automobile would certainly be included in 'insurance coverage' of 'the highest standard' as referred to as a part of 'certified service' in the Hertz Corporation 1964 annual report."

On August 15, 1965, Mr. James I. Parker went to Nassau, Bahamas, to investigate the automobile collision of June 8, 1965, and the claim of Sara C. Crowe and while there Mr. Terry Morrissey furnished to him a carbon copy of a rental agreement which is attached to the complaint, stating to Mr. Parker that this was the office copy of the rental agreement on the automobile in which plaintiff was injured.

At Morrissey's direction Mr. Parker went to the agency office of McCarthy Miller, Ltd., and was there told by the adjuster in charge that the automobile in which plaintiff was riding at the time of the collision was covered by a policy of insurance issued by Fireman's Insurance Company of Newark, New Jersey, but that there was no coverage afforded plaintiff because she was a passenger. Passengers, he stated, were excluded. The adjuster furnished to Mr. Parker a copy of the policy provisions which were made available to the Court.

The place where Mr. Morrissey was interviewed was outside the City of Nassau, near the airport, and bore several large Hertz signs similar in color and design to the usual Hertz signs.

A wrecked Vauxhall at the rear of the building was pointed out by Morrissey as the automobile in which plaintiff was injured.

Hertz, Hertz Rent A Car System, during the years 1956-64 advertised in Time Magazine. Many of these advertisements in the years 1956, 1957, 1958 and one or more in 1959 and 1960, and more than one in 1961 and 1962 stated that the low Hertz rates include everything, gas, oil, insurance or proper insurance. One advertisement on October 26, 1959, stated that Hertz has over 1750 offices spread throughout the United States and 31 foreign countries.

It further stated wherever you are, wherever you are going, there is a Hertz office nearby to serve you.

This advertisement further stated that Hertz rates include gas, oil and proper insurance.

Other ads stated "Hertz pays for insurance, gas and oil", or "Hertz pays for everything, insurance, gas and oil."

Mr. James Brown, an expert on automobile liability insurance is of the opinion that "proper insurance with reference to automobile coverages" would in all instances be "a liability insurance policy of standard terminology including liability claim protection as a result of personal injuries and property damages together with coverage for medical payments for passengers riding within the insured vehicle. This coverage is the customary coverage in the industry."

Mr. Brown is of the opinion that the insurance coverage afforded by the Firemens Insurance Company policy identified by Mr. Parker is not standard, is inadequate and does not afford even elementary requirements of a liability insurance policy.

The Hertz Corporation 1964 Annual Report, at page 12, states:

"INTERNATIONAL OPERATIONS.

> "Hertz Service outside the continental United States is provided by Hertz American Express International, Ltd., the subsidiary jointly owned by the corporation (51 per cent) and by the American Express Company, Inc. (49 per cent) . . . ."

The Hertz Corporation Annual Report 1965, under the heading "International Operations", at page 14, states:

> "The strong leadership position of Hertz in the international field was further enhanced by expansion on a worldwide front in 1965. Since its formation in 1957, Hertz American Express International, Ltd., (49 per cent owned by The American Express Company, Inc.) has become the largest vehicle renting and leasing organization operating outside the United States."

The plaintiff, Sara C. Crowe, underwent brain surgery at Emory University Hospital on Mrch 24, 1966, and is neither physically nor mentally able to give an affidavit for use herein at this time.

The plaintiff, prior to her injury, was a school teacher, a college graduate, well read and was a regular reader of Time Magazine and other national magazines and in the opinion of her father was familiar with the Hertz advertisements and the Hertz trademark.

In addition to the facts above stated by the trial court and adopted by us as correctly stating the posture of the matter at the time the trial court passed on the motion for summary judgment, the trial court also stated the following as being uncontroverted facts:

"It appears from the affidavit of Mr. Reiter, a vice president of the Hertz Corporation, that the Hertz Corporation was not doing business and did not do any business in the Bahama Islands during the year 1965, including June 8, 1965.

"That Caribbean Holding Company (Bahamas, Ltd.) was not on June 8, 1965, nor at any time since that date the agent or representative of the Hertz Corporation.

"That the Hertz Corporation did not furnish to the said Caribbean Holding Company any written rental agreement, and did not require that Caribbean Holding Company use the printed form as charged in the complaint.

"That Firemans Insurance Company of Newark, New Jersey, was not an insurance carrier for the Hertz Corporation with respect to any matter set forth in the complaint in this case."

Based entirely upon the affidavit of Mr. Reiter and upon the Hertz Corporation's annual statement that "Hertz

service outside the continental United States is provided by Hertz American Express International, Ltd." the trial court dismissed the complaint against Hertz. The court said:

"Plaintiff undertakes by circumstantial evidence to show that the Hertz Corporation was present and doing business in Nassau, Bahamas on June 8, 1965. However, the circumstances upon which Plaintiff relies are consistent with the testimony of Mr. Reiter and Hertz Corporation's statement in its annual report that 'Hertz service outside the continental United States is provided by Hertz American Express International, Ltd. . . .'

"A fact cannot be established for circumstances which are perfectly consistent with direct, uncontradicted, and unimpeached testimony that the fact does not exist." 32 A. C.J.S. Evidence, §1039, pp. 755, 756. See also *Wood v. Keen, et al*, 207 Ga. 317 (1).

"It is thus uncontroverted that the Hertz Corporation was not doing business in Nassau, Bahamas, on June 8, 1965, nor at any time that year. It is also uncontroverted that the company operating the Hertz Rent-A-Car place was not the agent or representative of the Hertz Corporation and that the Hertz Corporation had no knowledge of, and did not participate in the renting on June 8, 1965, of the car in which plaintiff was riding at the time of her injuries."

Thereupon the trial court dismissed the Hertz Corporation as a defendant, both as to the suit by Miss Crowe and as to the third party claim by defendant Cox.

In dismissing the complaint against the Hertz Corporation it is obvious that the trial court did so on the theory that the transaction between Cox and his friends in the Bahamas was not with the Hertz Corporation either di-

rectly or through an agent of that company. This, it seems to us, overlooks the essential nature of the suit that is brought by Miss Crowe and particularly as contended for by Cox, who admittedly is a protected driver of a "Hertz Rent-A-Car" so far as being entitled to insurance protection is concerned. The complaint is based on the assumption that every person reading and relying upon the Hertz advertising is warranted in accepting as true the statement that wherever a "Hertz" car is rented worldwide, the person relying upon such advertising is guaranteed that the highest standard of insurance protection is offered; that in this case the defendant Hertz Corporation, whether or not acting through its agent in the usual sense nevertheless provided through its subsidiary corporation for the renting to Cox of a "Hertz" car which did not have the insurance protection guaranteed to the public. The trial court stated, "The court recognizes the principle of law that where misrepresentations are made to the public at large with the intention of influencing any member of the public, then anyone injured through proper reliance thereon may secure redress," citing *Hinds v. Wilson*, 164 Ga. 889 (2) (b). The court then stated: "This principle of law which plaintiff seeks to invoke has no application under the facts here."

This conclusion was doubtless based upon the court's prior determination that the Hertz Corporation was not present either in person or through an agent in the Bahama Islands.

We think it plain that the presence or absence of the Hertz Corporation in the Bahama Islands at the time this automobile was rented by Cox and his friends, is irrelevant to the cause of action asserted by the injured plaintiff. Certainly it is irrelevant to the cross action filed on

behalf to Cox to secure his insurance protection in the event Miss Crowe should recover against him.

Moreover, we conclude that the trial court dealt too summarily with the question of the agency of the local "Rent-A-Car" station in the Bahamas for the Hertz Corporation. The quoted language in the trial court's opinion that a fact cannot be established by circumstances which are consistent with the direct, uncontradicted and unimpeached testimony that the fact does not exist, comes the Georgia case of *Wood v. Keen, et al,* 207 Ga. 317 (1), which cites the United States Supreme Court's opinion in *Pennsylvania R.R. v. Chamberlin,* 288 U.S. 333 (1932), a case which we have had occasion to discuss fully in an opinion just published in *Planters Manufacturing Co. v. Protection Mutual Insurance Company,* No. 23019, Dec. May . . ., 1967. As we stated in that opinion (see footnote 4) the language of the *Chamberlin* case may no longer be a correct statement of the federal jurisprudence in light of the more recent Supreme Court decision in *Lavender v. Kurn,* 327 U.S. 645, a point which we felt was not necessary for our decision in the *Planters Manufacturing Company* case. But see *Preston v. Safeway Stores,* 163 F. Supp. 749 (D.C.). Nor do we think it necessary to determine this question here. This is true because we think it quite clear that the existence *vel non* of "agency," or "representative," a status or relationship depending upon all the facts and circumstances, is not such physical or historical fact of the kind contemplated within the rule. If it were possible for a witness to directly, without contradiction, and without impeachment, testify flatly that he was not an agent or representative of another so that no circumstances, however strong, and no facts relating to conduct of the parties, or anything else could be permitted to overcome such conclusionary testimony, a large function of the fact finder's role in the de-

cisional process would be eliminated.[2] It would be tantamount to a rule that if Party A swears he was not *negligent,* then Party B could not prove A's negligence by circumstantial evidence.

> "It is a well settled principle of law that actual agency may be proved from the habits, course of dealing and apparent relations; that is to say, that when a course of dealing has been prolonged with the knowledge and consent of the principal, actual agency can be inferred from such course of dealing."
>
> *Piedmont Operating Co. v. Cummings,* 40 Ga. App. 397.

Whether an agency exists is not solely dependent upon the announced purpose of intention of the parties, for the law creates a relation of principal and agent if the parties, in their conduct of their affairs, actually place themselves in such position as requires the relationship to be inferred by the courts. Thus, even though a party may testify positively that there is no "agency," in existence between his company and another, this does not deprive the party relying on the existence of such agency to introduce evi-

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2. Purely as an illustration of the reason why such rule cannot be recognized, we note the obvious equivocal nature of Reiter's bald statement: "Caribbean Motor Holding Co. (Bahamas) Ltd. [the owner of the Hertz Rent-a-car station in Nassau] was not, on June 8, 1965, or at any time since said date, an agent or *representative* of the Hertz Corporation," (emphasis added) when viewed in light of the fact stated in the annual report for 1964: "Hertz service [dealing, of course, with service of interest and financial benefit to Hertz Corporation stockholders] outside the continental United States is provided by Hertz American Express International, Ltd." Should the jury be precluded from ascertaining whether the Hertz American Express International licensee in Nassau was not some kind of a "representative" of the Hertz Corporation which advertised its service to the stockholders as a significant part of the corporation's operations? At the very least it "represented" that it was in a position to carry out part of the Hertz Service, which included the plea, *worldwide,* "Let Hertz put you in the driver's seat."

dence showing the actual conduct of the parties if such conduct is such as would permit an inference to be made that the relationship of agency truly exists. See *Griffin v. Russell*, 144 Ga. 275. See also 3 Am. Jur. (2d), Agency, §17,18.

What we have said here deals with actual agency, not the creation of an agency by estoppel for the protection of one who has relied upon the appearance of such relationship. However, in this case it is equally available to the cross-claimant Cox to undertake to show, if the facts warrant it, that an agency by estoppel existed as to him, since he actually dealt with the "Hertz Rent-a-car" station in the Bahamas. Such an apparent agency could not exist for the benefit of the person injured without reliance upon the apparent holding out of the principal. See *Piedmont Operating Co. v. Cummings, supra.*

Because of the determination by the trial court that the Hertz Corporation was not present in the Bahamas through its agent, the court did not consider whether the complaint alleged a state of facts upon which relief could be granted either to Miss Crowe or to the cross-complainant Cox. We, therefore, do not pass on these questions. We hold that the circumstances found by the court to exist were sufficient to require that the case not be disposed of on motion for summary judgment dealing with the existence *vel non* of an agency for the Hertz Corporation in the Bahama Islands. We also conclude that the actual presence of the Hertz Corporation by an authorized agent in Nassau is not requisite to the bringing of the complaint against the Hertz Corporation on the theory propounded by the plaintiff and adopted by the cross-complainant—that is to say, the theory that the Hertz Corporation acted contrary to its widely advertised statements relating to the making available of maximum insurance protection as to every Hertz car when, by

whatever arrangement, it permitted its subsidiary to in turn license a local operator who failed to do what the advertisements promised. Again we do not here consider whether the complaint, as finally amended, established a cause of action, because this issue has not been passed on by the trial court. The ground for dismissing the suit being in error, the case must be returned for further consideration of the trial court.

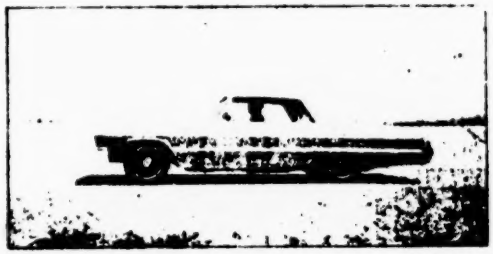
The judgment dismissing the complaint and cross-complaint against Hertz Corporation is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

POOR COPY

RENTAL AGREEMENT

HERTZ

let *HERTZ* put you in the driver's seat!



Page 1

Lessor identified on Page 2 hereby rents to the customer(s) undersigned on Page 2 herein called "Customer") the motor vehicle described on Page 2 herein called "Vehicle" subject to all the terms and provisions on Page 1 and Page 2 of this Rental Agreement, in consideration whereof Customer acknowledges and agrees:

1. Vehicle is the property of Lessor and is in good mechanical condition. Customer will return vehicle, together with all tires, tools, accessories and equipment in the same condition as when received, ordinary wear and tear excepted, to the place and on the date specified on Page 2 or sooner if demanded by Lessor.

2. Under no circumstances shall vehicle be used operated or driven: (A) for the transportation of persons or property for hire; (B) by any person who has given to Lessor a fictitious name or false age or address; (C) in any race, speed test or contest; (D) to propel or tow any trailer or (E) by any person except (1) Customer or (2) a qualified licensed driver and provided Customer's permission to drive is not delegated, or (3) Customer's family, (b) Customer's employer or (c) an employee of Customer in the course of such employee's regular employment by Customer. The foregoing restrictions are conditions, and each of them shall apply to every use, operation or direction of vehicle.

3. Customer will pay Lessor on demand all time and mileage service, minimum or other charges to be entered on Page 2 at the rates so shown or in use relative to any of the provisions of this Rental Agreement. Subject to paragraphs 5 and 8 hereof, Customer is responsible for and will indemnify Lessor on demand for (1) loss of or damage of whatsoever kind or nature to vehicle or the tires, tools, accessories and equipment therein or thereon, but not to exceed $100 unless vehicle was used, operated or driven in violation of any of the provisions of this Rental Agreement, (2) [illegible] transmitted to another person, firm or organization or body of which motor being an integral part, and (3) [illegible] said charges.

4. Customer or the driver of vehicle shall in no event be or be deemed the agent, servant or employee of Lessor [illegible] for any purpose whatsoever.

5. Lessor shall not be liable for loss of or damage to any property left, stored or transported in Customer's vehicle, other personal [illegible] return thereof to Lessor, whether or not said loss or damage was caused in whole or in part by the negligence of Lessor, its agents, servants or employees. Customer hereby assumes all risk of such loss or damage and waives all claims against Lessor by reason thereof, and Customer hereby agrees to hold harmless and indemnify Lessor against all claims based upon or arising out of such loss or damage.

6. Customer shall not be liable to Lessor on account of [illegible] collision losses to vehicle covered by a standard comprehensive insurance policy, including losses due to fire and theft.

7. Vehicle is covered by an automobile liability insurance policy, a copy of which is available for inspection at the main office of Lessor upon request by Customer. Said policy contains bodily injury or death liability limits of $100,000 for each person in each accident, $300,000 limit for all persons in any one accident, and property damage liability limits of $25,000 for each accident. Customer, being an insured under said policy, agrees to comply with and be bound by all the terms, conditions, limitations and restrictions thereof which are hereby incorporated by reference herein and made a part of this Rental Agreement as fully as if set forth at length. Said terms, conditions, limitations and restrictions of which no specific mention is made herein, include a requirement of said policy that the owner of the vehicle, if the vehicle must remain immediately after any accident report the same to Lessor at the location where vehicle was delivered to Customer, and a requirement that Customer, hereby assumes the insurer every process, pleading or paper of any kind relating to any [illegible] suit or proceeding, received by Customer or said driver in connection with any accident or occurrence involving vehicle. Said policy further requires that Customer and the driver shall refrain from making or offering the assistance of any claim and shall cooperate with Lessor and the insurer in the investigation and defense of any claim or suit. Said policy does not apply to [illegible] legislation for which Customer or the driver of vehicle or any insurance carrier may be held liable under any workmen's compensation or disability benefits law or under any similar law, (B) any obligation assumed by Customer or by such driver under any contract of whatever nature, (C) injury to or destruction of property owned by, rented to, in charge of or transported by Customer or the driver or (D) any liability of Customer or the driver of the employer of either with respect to loss from injury, sickness, disease or death of any employee of either while engaged in the business of operating or maintaining vehicle. It is understood that no person or organization is insured under said policy for hire in connection with the operation of vehicle, nor is any person insured under said policy while vehicle is used as a public or livery conveyance, or while vehicle is used to carry any property as a common carrier or in any business, unless specifically endorsed hereon. Subject to the foregoing, said policy insures Customer and, if Customer is an individual, members of Customer's household and relatives, and any partner or employee of Customer while using vehicle in the business of Customer, and any person responsible for or legally liable for the use of vehicle, provided the actual use thereof is with the permission of Customer, provided however that no such person or organization shall be insured under said policy if he, she or it has other valid and collectible insurance, whether primary, contributing or excess, covering such use; and provided further that with respect to any owned automobile not described herein, the insurance afforded by said policy shall apply only in excess of the amount or limits of any valid and collectible insurance available to the owner thereof for loss or damage to such owned automobile. Any provisions of said policy which are in conflict with the statutes of the state wherein vehicle is rented are hereby amended to conform to such statutes. Notwithstanding anything herein to the contrary, the insurance afforded by said policy is primary insurance to the extent required by law or regulation and is excess insurance over any other collectible insurance available to Lessor, its officers, agents or employees, whether primary, excess, contingent or on any other basis, to the extent permitted by law or regulation and to the extent so permitted, the liability coverage described in the policy is subject to the same terms, conditions, restrictions and limitations hereinbefore described under a board or self-insurance or similar program approved by the Insurance Commissioner of the state wherein vehicle is rented, and said policy is endorsed to conform thereto.

8. For provisions relating to collision damage waiver see Page 2.

9. The number of miles over which the vehicle shall have been operated pursuant to this Rental Agreement shall be determined by reading the standard mileage recording device attached to the vehicle by the manufacturer.

10. Without limitation of any general obligations or responsibilities imposed by other provisions of this Rental Agreement, Customer shall be solely liable and responsible for all fines, penalties and forfeitures imposed for parking or traffic violations while the vehicle is held, used, operated or driven pursuant to this Rental Agreement.

11. No right of Lessor under this Rental Agreement may be waived except by a written instrument duly signed by the President and Secretary of Lessor.

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